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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~880~~. 599 316

LEVINA CAMPBELL, ANNIE L. MURRAY, FRANK X. MURRAY, AND AMELIA E. HARTNETT, PLAINTIFFS IN ERROR,

vs.

THE LACLEDE GAS LIGHT COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED SEPTEMBER 26, 1884.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 959.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Missouri, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Levina Campbell, Annie L. Muray, Frank X. Muray, and Amelia E. Hartnett, plaintiffs, and The Laclede Gas Light Company, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; and wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; and wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiffs, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 23d day of June, in the year of our Lord one thousand eight hundred and eighty-four.

Issued at office in the city of — Louis, with seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

[SEAL.]

A. P. SELBY,
Clerk of said Circuit Court,
By T. L. CRAWFORD, *Deputy.*

Allowed by—

WARWICK HOUGH,
Chief Justice of the Supreme Court of Missouri.

b United States of America to The Laclede Gas Light Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Missouri, wherein Levina Campbell, Annie T. Murray, Frank X. Murray, and Amelia E. Hartnett are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Warwick Hough, chief justice of the supreme court of Missouri, this 23d day of June, in the year of our Lord one thousand eight hundred and eighty-four.

WARWICK HOUGH,
Chief Justice of the Supreme Court of Missouri.

Due service of above citation acknowledged, & bond waived.

C. & C. E. GIBSON,
For Def't in Error, The Laclede Gas Light Co.

c STATE OF MISSOURI, *sct:*

Be it remembered that heretofore, to wit, on the 2d day of April, A. D. 1881, there was filed in the office of the clerk of the supreme court of the State of Missouri a transcript, which is in words and figures as follows, to wit:

1 STATE OF MISSOURI, *ss:*

Be it remembered that heretofore, to wit, on the twelfth day of June, A. D. 1880, there was filed in the office of the clerk of the St. Louis court of appeals a transcript, in the words and figures following, to wit.

STATE OF MISSOURI, *City of St. Louis:*

Be it remembered that heretofore, to wit, on the 5th day of January, 1877, there was filed in the office of the clerk of the circuit court, city of St. Louis, a petition, which is in words and figures as follows, to wit:

Petition.

STATE OF MISSOURI, *County of St Louis:*

In the Circuit Court of St. Louis County.

LEVINA CAMPBELL, FRANK H. MURRAY, and ANNIE H. MURRAY, his wife, and ANNIE E. HARTNETT,

vs.

THE LACLEDE GAS LIGHT COMPANY and THE CITY OF ST. LOUIS.

2 Plaintiff states that defendants are corporations organized under the laws of the State of Missouri, The Laclede Gas Light Company, doing business in the city of St. Louis and

State aforesaid, and the city of St. Louis being a municipal corporation, and that plaintiffs, Frank H. Murray and Annie L. Murray are husband and wife, and that the rights of the plaintiffs, Frank H. Murray and Annie L. Murray, of, in, and to the real estate herein described, are by virture of the title of said Annie L. Murray. Plaintiffs further state that on the first day of January, 1872, they were lawfully entitled to the possession of the following-described real estate, lying and being within United States survey numbered six hundred and seventy-one, in township 45 W., R. 7 E. of the 5th P. M., described as follows: Bounded west by a line drawn parallel with, and three hundred and sixty-one feet and four inches east of the eastern line of Main street, of the city of St. Louis, and State of Missouri; south by the north line of Mullanphy street, of said city, extending to the Mississippi
3 river, east by the Mississippi river, and north by a line drawn parallel to, and one hundred and thirty-seven feet six and $\frac{58}{100}$ of an inch north of, the northern line of Mullanphy street, extended to said river as aforesaid; and, being so entitled to the possession thereof, the defendants afterwards, to wit, on the day and year aforesaid, entered into said premises, and unlawfully withholds from the plaintiffs the possession thereof, to their damage in the sum of five thousand dollars.

They further aver that the monthly value of the rents and profits of said premises is two hundred and fifty dollars.

Wherefore they demand judgment for the recovery of the possession of said premises, and for five thousand dollars damages for the withholding of the same from plaintiffs, and two hundred and fifty dollars monthly rents and profits, from the rendition of judgment until the possession of the premises is delivered to plaintiffs, and for other proper relief.

JOHNSON & SCHULTE AND
4 PHILIP DONOHUE,
Att'ys for Pl'ffs.

Whereupon a summons issued, directed to the sheriff of St. Louis county, and by him returned, duly, on the 18th day of January, 1877, as to both parties defendant.

And afterwards, to wit, on the 6th day of February, 1877, defendant, The St. Louis Gas Light Company, filed its separate answer, in words and figures as follows, to wit:

Ans. Laclede Gas Light Company.

St. Louis Circuit Co. Feb'y T., 1877.

LEVINA CAMPBELL *et al.*
vs.
LACLEDE GAS LIGHT COMPANY. } No. —.

The Laclede Gas Light Company, for answer to the petition filed in this cause, denies that plaintiffs, or either of them, were, at the

time alleged, or at any time, lawfully entitled to the possession of any part of the premises in dispute, and described in the petition, or that this defendant unlawfully withholds such possession
5 from the plaintiffs, or that they have suffered any damages thereby, or that the premises are of the monthly value charged in the petition.

C. GIBSON,
For Laclede Gas Light Co.

And on the 7th day of February, 1877, defendant, The City of St. Louis, filed its separate answer, in words and figures as follows, to wit:

Seperate Ans. of City of St Louis.

In the Circuit Court of St. Louis County. February Term, 1877.

LEVINA CAMPBELL, FRANK H. MURRAY, and ANNIE L. MURRAY and AMELIA E. HARTNETT, Pl'ffs,

vs.

THE LACLEDE GAS LIGHT CO. and THE CITY OF ST. LOUIS.

STATE OF MISSOURI, *County of St. Louis:*

Defendant, The City of St. Louis, for its separate answer to plaintiffs' petition, herein filed, says: That as to whether said plaintiffs, Annie L. Murray and Frank H. Murray, are husband and wife it has not sufficient knowledge or information to form a belief, and demands proof thereof.

Defendant denies that plaintiffs, or any of them, were law-
6 fully entitled to the possession of the premises described in the petition at the time mentioned in said petition.

Denies that defendant entered into such premises, as stated in the petition.

Denies that it unlawfully withholds from plaintiffs the possession thereof.

Denies that plaintiffs have —— damaged in the sum mentioned in the petition, or in any other sum.

Denies that the monthly value of said premises is as stated in said petition.

Defendant avers that heretofore, in this court, in case number 33104, this same suit was brought, and non-suit taken on the 6th day of January, 1876.

And defendant further avers that said alleged cause of action did not accrue within ten years next proceeding the commencement of this suit, nor is this suit brought within one year after non-suits suffered, as aforesaid, and that the same is barred State, and not entitled to any recognition or consideration by this court.

Defendant, having fully answered herein, prays hence to
7 be discharged with its costs.

E. T. FARISH,
For the City.

And afterwards, to wit, on the 7th day of November, 1879, plaintiffs filed their reply to the separate answer of the City of St. Louis in words and figures following, to wit:

Reply to Separate Ans. City of St. Louis.

In Circuit Court of the City of St. Louis.

LEVINA P. CAMPBELL *et al.*
vs.
THE LACLEDE GAS LIGHT COMPANY *et al.*

Plaintiffs' reply to separate answer of The City of St. Louis, filed herein, deny each and every material allegation therein contained, except as herein admitted; admit the non-suit in cause No. 33104, as alleged in said answer, but aver this suit was brought within one year thereafter, to wit, on the 5th of January, 1877; aver that the mother of plaintiffs, Annie L. and Emelia E., to wit, Ann Eliza Hartnett, through whom they claim title, was married to John Hartnett,
8 their farther, December 19th, 1849; that their said mother died March 30th, 1854, and their said father died March 15th, 1860, and that said plaintiffs arrived at the age of twenty-one years within three years next before the institution of said suit No. 33104; and plaintiff, Levina P., avers that she was married to George W. Campbell August 4th, 1853, and that said George continued to be her husband until December 5th, 1872, the date of his death; and they all further aver that the legal title to the premises remained in the United States until June 6th, 1874.

Wherefore they pray judgment as asked in the petition.

E. P. JOHNSON AND
A. R. TAYLOR,
For Pl'ffs.

And afterwards, at the December term, A. D. 1879, and the February term, A. D. 1880, of said court, the following proceedings were had in said cause, to wit:

Judgm't.

MONDAY, *January* 19, 1880.

LEVINA CAMPBELL, FRANK H. MURRAY, and ANNIE L. MURRAY, his wife, and AMELIA HARTNETT,
vs.
THE LACLEDE GAS LIGHT COMPANY and THE CITY OF ST. LOUIS. } 41651.

9 Now comes the parties' respective attorneys and file a stipulation herein; and, in accordance therewith, and by leave of court, plaintiffs amend their petition by interlin-ation, so as to make the western boundary line of the land described therein as follows: "West by a line drawn parallel with and three hundred and sixty-one feet and four inches east of the eastern line of Main street, of the city of St. Louis." Thereupon the parties, waiving a jury, sub-

mit this cause to the court upon the pleadings and on the agreed statement of facts; and the court, having duly heard and considered the same, and being fully advised of and concerning the premises, doth find the issues herein joined in favor of the plaintiffs, and doth find that the plaintiffs are entitled to the possession of the following-described real estate lying and being within United States survey numbered six hundred and seventy-one, in township 45 N., R. 7 E. of the 5th P. M., described as follows: Bounded west by a line drawn parallel with and three hundred and sixty-one feet and four inches east of the eastern line of Main street, of the city of
10 St. Louis, and State of Missouri; south by the north line of Mullanphy street, of said city, extended to the Mississippi river; east by the Mississippi river, and north by a line drawn parallel to and one hundred and thirty-seven feet six and $\frac{58}{100}$ of an inch north of the north line of Mullanphy street, extended to said river as aforesaid, in the following proportions, to wit: The plaintiff, Levina Campbell, is entitled to ten twenty-fourths ($\frac{10}{24}$ths) thereof; the plaintiffs, Frank H. Murray and Annie L. Murray, his wife, are entitled to three twenty-fourths ($\frac{3}{24}$ths) thereof; and plaintiff, Amelia E. Hartnett, is entitled to three twenty-fourths ($\frac{3}{24}$ths) thereof; and the court doth assess the plaintiffs damages at the sum of one hundred ninety-six dollars and forty-seven cents, and doth find the monthly value of the rents and profits of the premises sued for to be three dollars and thirty-three cents. It is therefore considered by the court that the plaintiffs recover of the defendants the possession of the above-described premises, according to the proportion as found, to which each is entitled, and also the damages as
11 assessed, together with the monthly value of the rents and profits of the premises sued for, to be three dollars and thirty-three cents. It is therefore considered by the court that the plaintiffs recover of the defenda-ts the possession of the above-described premises, according to the proportion as found, to which each is entitled, and also the damages as assessed, together with the monthly value of the rents and profits as found, and also their costs and charges in this behalf expended, and have execution therefor.

Mo. for New Trial Filed and Overruled.

THURSDAY, *January* 22, 1880.

LEVINA CAMPBELL *et al.*
vs.
THE LACLEDE GAS LIGHT COMPANY *et al.* } 41651.

Motion for new trial filed.

MONDAY, *February* 2, 1880.

LEVINA CAMPBELL *et al.*
vs.
THE LACLEDE GAS LIGHT COMPANY *et al.* } 41651.

The motion for new trial herein, being heard and fully considered by the court, is overruled.

12 *Laclede G. L. Co.'s Bill of Exc'ts, Aff't, & Bond for Appeal Filed & Granted.*

WEDNESDAY, *February* 18, 1880.

LEVINA CAMPBELL *et al.*
vs.
THE LACLEDE GAS LIGHT COMPANY and THE CITY OF ST. LOUIS. } 41651.

Now comes the defendant, The Laclede Gas Light Company, by attorney, and files a bill of exceptions, and also an affidavit for an appeal, and on his motion an appeal is allowed defendants to the St. Louis court of appeals from the judgment herein rendered; he thereupon files an appeal bond which is approved by the court. Which said bill of exceptions, affidavit, and bond for appeal of the Laclede Gas Light Company are respectively in words and figures as follows, to wit:

In the Circuit Court for the City of St. Louis.

LEVINA P. CAMPBELL *et al.*
vs.
THE LACLEDE GAS LIGHT COMPANY *et al.*

Now, on this 19th day of January, 1880, the foregoing cause coming on to be heard, the respective parties thereto, by their attorneys, announced themselves ready for trial, and a jury being waived,
13 said cause is tried by the court, setting as a jury. Plaintiffs, to sustain their action, produced the following evidence: It is admitted that on the 16th day of October, 1799, the Lieutenant Governor of Louisiana (Delassus) gave to Peter Chouteau a concession or order of survey for ninety-three arpents and one perch of land on the Mississippi river which was duly confirmed to him on the 29th day of May, 1811, by the board of commissioners, for ascertaining and adjusting the titles and claims to lands in the Territory of Louisiana, and gave him a certificate, No. 671, of the date last named, certifying that he was entitled to a patent under the provisions of the 4th section of an act of the Congress of the United States, entitled "An act respecting claims to lands in the Territories of Orleans and Louisiana," approved the 3rd of March, 1807, which said confirmation was duly surveyed by Joseph C. Brown, deputy U. S. surveyor, and said survey returned to and filed in the
14 office of the recorder of land titles for the U. S. on the 2d day of April, 1817, which survey is numbered 671.

Plaintiffs then read in evidence an act of Congress of the United States, approved June 6th, 1874, entitled "An act for obviating the necessity of issuing patents for certain private land claims and for other purposes," and an act of the General Assembly of the State of Missouri, approved March 24th, 1875, entitled an act concerning the act of Congress of June the sixth, eighteen hundred and seventy-four (in reference to patents), Laws of Missouri, 1875, page 85.

It is admitted that the foregoing confirmation and survey em-

braced the premises in controversy in this suit, and the land described in the partition suit in the case of William Waddingham *vs.* Levina Wheeler *et al.*, and the land in controversy in the chancery suit of William Waddingham *vs.* Levina Wheeler *et al.*, which two latter suits are more particularly described herein.

15 *Decree in Chancery, case Waddingham vs. Levina Wheeler et al.*

TUESDAY, 20*th May*, 1834.

WILLIAM WADDINGHAM

vs.

LEVINA WHEELER, Widow Henry M. Wheeler; ANN ELIZA WHEELER, LEVINA WHEELER, infant heirs, & AUGUSTUS H. EVANS, Administrator of Edward P. Wheeler, deceased.

These proceedings should be inserted in the defendants' part of the case. They were not given in evidence by plaintiffs.

C. GIPSON.
E. P. JOHNSTON.

Now, at this day, cause coming on to be heard by consent of said complainant and of said infants, by their guardians, and of the other defendants, on hearing the bill and answers and also proofs in support of the allegations of the bill, the court being satisfied that the said allegations are sustained, and that undivided moiety of the real estate in the bill mentioned as vested in the deceased, Edward P. Wheeler, doth equitably belong to the said complainant, doth order, adjudge, and decree that the undivided moiety of a lot of ground lying on the Mississippi river, about one-third of a mile north of the city of St. Louis, having a front on the margin of the Mississippi one hundred and forty feet, and extending from
16 said river westwardly between two parallel lines at a distance from each other of one hundred and thirty-seven feet and fifty-eight hundredths of a foot; the southern line extending from the river six hundred and forty-two feet and ninety-six hundredths of a foot; the northern line extending from the river six hundred and seventeen feet and four hundredths of a foot, containing eighty-six thousand six hundred and seventy-five square feet and four-tenths of a foot, being the same lot conveyed to said Wheeler in his lifetime by Thomas J. Payne; also, the undivided eighth part of a strip of land which lies immediately adjoining and south of the before mentioned and described lot, fronting on the Mississippi river sixty feet and extending westwardly from the Mississippi to the most western point of the aforesaid lot, and being in breadth fifty-eight feet and ninety-eight hundredths of a foot, pass from and out of the said Levina Wheeler, widow, and Henry M. Wheeler, Ann Eliza Wheeler, and Levina Wheeler, infant heirs of said Edward P.
17 Wheeler; and the same is hereby passed out of them and vested in said William Waddingham as against said defendants, and each of them; to have and to hold the said undivided moiety of the lot of ground first above described and the said

undivided eighth of this strip of ground last above mentioned unto him, the said William Waddingham, his heirs and assigns, forever; and it is further ordered that said complainant do pay the costs of this suit.

Order on Def'ts to Appear & Plead to Petition in Partition, suit Waddingham vs. Levina Wheeler.

TUESDAY, 12*th July*, 1836.

WILLIAM WADDINGHAM

vs.

LEVINA WHEELER, widow, and HENRY M. WHEELER, ANN ELIZA WHEELER, & LEVINA WHEELER, children of Edward P. Wheeler.

Petition for Partition.

Now, at this day, comes the said petitioner, by his attorney, and files his petition, stating therein that he and the said defendants are owners of a lot of ground in St. Louis county, lying in the Mississippi river, about a third of a mile north of the city of
18 St. Louis, having a front on the margin of said river of one hundred and forty feet, and extending from the river westwardly between two parallel lines at a distance *at a distance* from each other of one hundred and thirty-seven feet and fifty-eight hundredths of a foot; the southern line thereof extending from the river Mississippi six hundred and forty-two feet and ninety-six hundredths of a foot; the northern line extending from the river six hundred and seventeen feet and four hundredths of a foot, containing six thousand six hundred seventy-five square feet and four-tenths of a foot, conveyed by Thomas J. Payne to Edward P. Wheeler by deed dated the first day of August, 1831; that the said petitioner is entitled to the undivided one-half of said lot, and that said children of Edward P. Wheeler, as his heirs, are together entitled to the other undivided one-half of said lot and appurtenances, subject to the said
19 widow's dower therein, so that the rights of the parties are as follows, viz: William Waddingham owns $\frac{3}{6}$, Henry M. Wheeler $\frac{1}{6}$, Ann Eliza $\frac{1}{6}$, Levina $\frac{1}{6}$, in which last three-sixths the widow has a life estate for her dower, and no other person has any interest in said land; wherefore he prays that a division and partition of said ground, according to the respective rights of said parties may demand, or that the same may be sold, if it shall appear that partition cannot be made without great prejudice to the owners, and the proceeds of the sale divided according to law, which said partition is verified by the oath of said petitioner; and it appearing to the court that the said defendants have been duly served with notice of said petition according to law, it is ordered by the court that the said defendants appear and plead to said petition on or before Monday next, the eighteenth instant.

20 *Appearance of J. C. Laveille as Party Def't Entered.*

WEDNESDAY, 3*rd August*, 1836.

WILLIAM WADDINGHAM *vs.* LEVINA WHEELER & others.

Now this — comes the said plaintiff, by his attorney, and suggests that since the commencement of this suit Levina Wheeler, widow of the said Edward P. Wheeler, has married to one Joseph C. Laveille, which suggestion is not denied, but admitted to be true, and thereupon the said Leveille enters his appearance as a party to the cause, and waives all delay that might by law be had upon said suggestion.

Order of Partition.

FRIDAY, 5*th August*, 1836.

WILLIAM WADDINGHAM
vs.
HENRY M. WHEELER, ANN ELIZA WHEELER & LAVINIA; JOSEPH C. LAVEILLE, & LAVINA, his wife.

Petition for Partition.

Now, at this day, comes again the said plaintiff, by his attorney, and the said defendants not having answered the petition of the said petitioner as required by the order of this court, the facts set forth in
21 said petition are taken as confessed. Whereupon it is ascertained and determined by the court that the said petitioner is entitled to three-sixths of said real estate, and that each of the said children of Edward P. Wheeler, deceased, is entitled to the one-sixth part of the same, in which last the said Levina Laveille, formerly Levina Wheeler, has a life estate for her dower; therefore it is considered by the court that partition of the said real estate be made between the parties according to their respective rights as above ascertained, and it is hereby ordered that Mary P. LeDuc, Edward Tracey, and William Glasgow, three respectable freeholders, residents of the county of Saint Louis, where the lands lie, be, and they are hereby, appointed commissioners to make the said partition, quantity, and quality relatively considered, according to the respective rights and interests of the parties as above ascer-
22 tained, and that they make report of their proceedings in the premises at the present term of this court.

Order to Com'rs to Sell Property for Partition.

MONDAY, 22*d August*, 1836.

WILLIAM WADDINGHAM
vs.
HENRY M. WHEELER, ANN ELIZA WHEELER, JOSEPH C. LAVEILLE, & LEVINA, his wife.

Now this day come again the said commissioners, to wit, Mary P. LeDuc, Edward Tracey, and William Glasgow, and file their report,

stating therein that in their opinion partition of the premises in the said petition mentioned cannot be made without great prejudice to the owners; and the court being satisfied that such report is just and correct, it is ordered that the said commissioners proceed to sell the premises aforesaid to the highest bidder, at public auction, at the court-house door, in the city of Saint Louis, on the fourth Monday of November next, one-fourth of the purchase-money to be paid in hand, one-fourth in six, one-fourth in twelve, and the re-
23 mainder in eighteen months from the day of sale, the purchaser to give a deed of trust on the property sold to secure the payments; and it is further ordered that said commissioners give notice of the time, terms, and place of sale, according to the statute in such case made and provided.

Order Postponing Sale.

SATURDAY, —— 18TH, 1837.

WILLIAM WADDINGHAM
vs.
HENRY M. WHEELER, ANN ELIZA WHEELER, LEVINA WHEELER, JOSEPH C. LAVEILLE, & LEVINA, his wife. } In Partition.

It being represented by the commissioners appointed to make partition of the premises aforementioned that they had not made sale thereof as directed in the order of sale made in this cause, it being their opinion inexpedient to sell at the time mentioned in said order, on motion it is ordered that said commissioners, to wit, Mary P. LeDuc, Edward Tracey, & William Glasgow, pro-
24 ceed to sell said premises on the first Monday, being the fifth day of June next, on the premises, one-fourth of the purchase-money to be paid in hand, one-fourth in six months, one-fourth in twelve, and one-fourth in eighteen months from the day of sale, to be secured by notes and mortgage, or deeds of trust, upon the property sold. And it is further ordered that said commissioners give due notice, according to law, of the time, place, and terms of said sale

Com'n's' Report Ratified and Sale Confirmed.

FRIDAY, 28*th July*, 1837.

WILLIAM WADDINGHAM
vs.
HENRY M. WHEELER, ANN ELIZA WHEELER, & LEVINA WHEELER, JOSEPH C. LAVEILLE & LEVINA, his wife. } In Partition.

Now at this day come again the commissioners and file their report, verified according to law, stating therein that in pursuance of the order of sale made in this cause they had proceeded to
25 sell the premises therein mentioned and described, having first given notice, according to law, of the time, terms, and place of sale, and in their said report they described the property sold, the amount bid therefor, and the names of the purchasers

therefor, which report, and the matters and things therein contained, is ratified by the court, and confirmed as valid and effectual forever. And the said commissioners, or a majority of them, are directed to make the proper deeds to the respective purchasers.

And the title of said Peter Choteau to the land in controversy, and described in said suits, excepting the accreation made thereto subsequently, became vested by regular conveyances on or before the first day of October, 1821, absolutely in Edward C. Payne, Daniel McPayne, Thomas J. Payne, John B. Payne, and James B. Payne.

Plaintiffs then gave in evidence the following documents: First, a certified copy of a deed from said Edward C. and John B.
26 Payne, dated October 4th, 1828, and recorded in the recorder's office of St. Louis county October 30th, 1828, in consideration of the sum of one dollar, conveying to said Thomas J. Payne and Daniel McPayne all their interests in the premises described in said chancery and partition suits. Second, a certified copy of a deed from said James B. Payne to said Thomas J. Payne, dated October 11th, 1829, and recorded in the recorder's office of said county December 15th, 1829, conveying, in consideration of the sum of one hundred dollars, all of his interest in the premises described in said chancery and partition suits to said Thomas J. Payne. Third, a certified copy of a deed from said Daniel McPayne, dated June 14th, 1831, recorded in the recorder's office of said county June 30th, 1831, conveying, in consideration of the sum of one dollar, all of his interest in the premises described in said chancery and partition suits to said Thomas J Payne.

27 That *on* acknowledgment in the following *firm*, and no other, was endorsed upon each of the three deeds just designated: "I" (meaning the officer) "do certify that this deed from" (naming the grantor) "to" (naming the grantee) "was by this day produced to me in my office, and acknowledged by said" (naming the grantor)" to be his act and deed. Whereupon the same, together with this certificate, is certified to the proper officer for record. In testimony whereof I have hereunto set my hand and affixed the seal of said county this 12th day of ———, ——." The said deeds and acknowledgments being in all respects sufficient to vest said Chouteau title in said Thomas J. Payne, and entitle them to record, if the acknowledgments be sufficient proof of the execution. The original of said deeds not being in the possession of, or under the control of any of the parties to this suit, and certified copies of the aforesaid records of St. Louis county being offered in evidence by plaintiffs
28 as aforesaid, to the reading of which evidence, and each of them, the defendants objected on the following grounds: That said deeds and each of them were not originals, but certified copies, and the certificate of acknowledgment attached to, and endorsed upon each of them, was defective in failing to certify that the respective grantors were personally known to the officer taking the acknowledgment, to be the same person whose name was subscribed to the deed as a party thereto, which said objection the court over-

ruled, to which said action of the court the defendants then and there excepted.

That said Thomas J. Payne by deed dated August 1st, 1831, recorded October 10th, 1831, in the recorder's office of said county, October 10th, 1831, in consideration of the sum of $2,131.25, conveyed all of his interest in the premises described in said suits to Edward P. Wheeler. That said Edward P. Wheeler died intestate in
29 said county October 22d, 1832, leaving surviving him three children, Henry M. Wheeler, born Sept. 22d, 1824, Ann Eliza Wheeler, born May 6th, 1828, and Levina P. Wheeler, born December 6th, 1832, a posthemous child, as his only heirs at law, all then minors, under the age of twenty-one years, and who continued to be such until after the proceedings in partition hereinafter set forth, and also the proceedings in chancery hereinafter set forth, had been taken and completed. Said Henry M. Wheeler died in the year 1860, unmarried, leaving his said sister, Levina P., and the children of his said sister, Ann E., as his only heirs at law; said Ann Eliza Wheeler and John Hartnett were married December 19th, 1849, and had two children born to them, to wit: Annie L., born November 12th, 1850, and Amelia E., born January 21st, 1854; said Ann Eliza died March 30th, 1854, leaving surviving her her said husband, who died March 15th, 1860, and her said children, Annie L. and Amelia E., the latter being her only heirs at law. Said Annie L. intermarried
30 with Frank H. Murray, one of the plaintiffs herein, October 21st, 1872; said Levina P. Wheeler intermarried with George H. Campbell, August 4th, 1853, and said George H. Campbell died December 5th, 1872, which left plaintiffs the sole surviving heirs of said Edward P. Wheeler at the latter date.

That defendants are corporations as alleged in the petition. That plaintiffs herein instituted a suit in ejectment on the 20th day of February, 1875, in the court against defendants for the recovery of the possession of the premises described in the petition herein, which suit terminated on the sixth day of January, 1876, within one year of the commencement of this action, by plaintiffs suffering a nonsuit therein, by reason of an adverse instruction given on the part of the court for defendants, on the trial of said cause. For the purposes of this action only it is admitted that defendants have had a joint possession of the premises described in the petition
31 herein since February first, 1875, and the value of the monthly rents and profits of the same from that time are and have been five dollars per month. It is further admitted that the concession or order of survey granted to said Peter Chouteau, and the confirmation to him, and said survey No. 671, and all the foregoing conveyances, all called for the Mississippi river as the eastern boundary of the land therein described and purported to be conveyed.

Testimony of William H. Cozzens.

WILLIAM H. COZZENS, having been first duly sworn, testified as follows:

I am a city surveyor of the city of St. Louis, and have been a

surveyor for about forty years. I am acquainted with the premises described in the petition of plaintiffs in this cause. They are (excepting the accreations) a portion of the land described in the deeds offered in evidence by plaintiffs. I was acquainted with Edward P. Wheeler and William Waddingham; said Wheeler died many years ago.

32 Here a plat is shown witness, being the same annexed to the report of the commissioners in partition in the case of William Waddingham *vs.* Levina Wheeler *et al.*, and which is as follows:

(Here follows diagram, marked page 33.)

34 And is offered in evidence by defendant.

I am acquainted with the land embraced within the limits described in this plat. The premises are the same described in the deed, read in evidence, from Payne to Wheeler. I made the survey about the year 1837 from which this plat was made. Edward P. Wheeler and William Waddingham had been partners, and had a slaughter-house on this land. Waddingham continued the business after the death of Wheeler, and resided on and occupied said premises up to the time of his death. There was a strip of land, as shown on this plat, between the lots, as laid down on this plat, and the Mississippi river, of from nine to fifteen feet wide. There was never any building on, nor enclosure of, said land between the eastern line of the lots, as laid down upon this plat, and the river; but the same always remained open. After the year 1853 deposits were gradually made by the water on the west band of the

35 river, opposite to and adjoining this land, until the same has been extended one or two hundred feet east. This accreation was formed since the year 1853. The premises described in the petition of plaintiffs are the same as the land lying east of the lots as laid down on this plat, with the accreation thereto.

Said plat is here offered and read in evidence by plaintiffs.

Plaintiffs here closed their case.

Defendants then offered in evidence a certified copy of what purported to be a patent from the United States to said Peter Chouteau for said survey No. 671, which copy appeared to be perfect in all respects, and sufficient to pass the title to the said survey from the United States to said Peter, but which copy was made and certified by the recorder of deeds of St. Louis county, from a record thereof made in the year 1847 in said records, to the reading of which in evidence the plaintiffs objected for the reasons that at the time

36 said record was made there was no law authorizing or permitting such a copy to be used in evidence, nor is there any law legalizing such a record, or authorizing a copy thereof to be read in evidence, and for the further reasons that no such patent had ever been issued, and to sustain the latter exemplication of the records of patents in the General Land Office of the United States, a document being the same in all respects as the purported copy of a patent offered in evidence by defendants, except that there was no

seal attached to the one offered by plaintiffs, and also a letter from the Commissioner of the General Land Office of the United States, stating that there was no evidence on the records of his office that a seal had ever been attached to the record from which said exemplication had been made. (A copy of said letter is as follows:)

Letter from Com'r Gen'l Land Office.

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 15, 1875.

E. P. JOHNSON, Esq., *St. Louis, Mo.*

37 SIR: I am in receipt of your letter of 27th ultimo returning certified copy of patent dated M'ch 26th, 1824, in favor of Peter Chouteau, as recorded vol. 4, pp. 283 and 284, "Record of Donation Patents," which was transmitted to you with my letter of 23d ultimo, and stating that said copy is defective in that the seal has been omitted from said copy.

In reply I have to state that it appears by examination of the record of said patent that the same is defective in that the seal was omitted to be copied therein, and that said copy is a true and literal exemplication of said record. It is probable that the seal of the General Land Office was affixed to the patent, but as there is no authority to correct the record in the absence of said patent, or to issue a duplicate patent, as suggested in your letter, I return herewith said certified copy, and *and* acknowledge the receipt of $1.60, the
38 amount of fees which you were requested to remit in payment of same in my letter of 23d ultimo.

Respectfully, A. A. BURDETT,
Commissioner.

The original patent was not in the possession or under the control of either party to this action, which objections the court overruled, and thereupon plaintiffs then and there excepted, and the copy of said patent was then read in evidence.

The defendants then offered in evidence the record and proceedings in chancery in the circuit court of St. Louis county, in case of William Waddingham against Levina Wheeler, widow, and the aforesaid three minor children of said Edward P. Wheeler, (for this second see p. 15 this transcript), instituted in the year 1832, after the death of said Edward P., for the purpose of vesting in said Waddingham the undivided half of the premises described in said chancery and partition suits, on the grounds that he was a co-
39 purchaser with said Edward P. Wheeler of the same, and paid one-half of the purchase-money, in which proceedings a decree in favor of the complainant was rendered by said court for the purpose of vesting, and which purported to vest, the undivided half of the title of said premises in the complaint. At the time of the institution of said suit plaintiff, Levina P. Campbell, *nee* Wheeler, was not born. A supplemental bill was filed in said proceedings after her birth, to which her general guardian, her mother, made answer. The proceedings omit to show any summons, writ, or sub-

pœna was ever issued in said proceedings for her, or served upon her. With this exception, said proceedings were in all things regular, and the decree sufficient to vest the undivided one-half of said Chouteau title to said premises in said Waddingham, to the reading of which said record and proceedings in evidence the said
40 plaintiff, Levina P., objected, on the ground that she was never served with process in, was no party to said action and proceedings, and the said decree was void as to her. The court held the objection is well taken as to Levina Campbell, but not as to the other heirs, and therefore the proceedings were admitted in evidence as to the other plaintiffs only, and to which action of the court the defendants then and there excepted.

Defendants then offered in evidence the record and proceedings in partition in the circuit court of St. Louis county, begun on the 11 of June, 1836, in case of William Waddingham against Levina Wheeler, widow, and the aforesaid three minor children of the said Edward P. Wheeler (for this record see page 17 this transcript), for the purpose of partitioning the real estate described in the proceedings in which said decree was obtained, and in the report and plat hereinafter made a part hereof, in which proceedings commissioners were appointed, who reported to the court that they had
41 sold said premises in accordance with the orders of the court, which said report was confirmed by said court at the September term, 1837, thereof. At the time of instituting these proceedings in partition a copy of the petition, affidavit, and notice were served on the said Levina Wheeler by delivering to her a true copy of the petition and notice, and on said Henry M., Ann Eliza, and Levina P. by delivering a true copy of the petition, affidavit, and notice to Levina Wheeler, their guardian. No other service was had in said cause on said minors, and there was no appearance by them or for them by general guardian. The court appointed a guardian *ad litem* to act for them, who appeared for them in said cause, if an appointment under the circumstances authorized him to appear. In all other respects, excepting as may be shown by the commissioners' plat and deed, executed by them hereinafter [and]
42 made a part hereof said proceedings, and the sale and deeds made thereunder, were in all things regular and sufficient to pass title to the real estate described in the deeds made by the commissioners, to the reading of which said record and proceedings in evidence the plaintiffs objected. The report of the commissioners in which, and the plat thereunto attached, are in words and figures following:

Report of Com's in Partition Suit of Waddingham vs. *Wheeler Heirs.*

St. Louis Circuit Court.

WILLIAM WADDINGHAM

vs.

HENRY M. WHEELER, ANN ELIZA WHEELER, LEVINA WHEELER, JOSEPH C. LAVEILLE, and LEVINA, his wife.

The undersigned, commissioners appointed by the court in this

case, report that, in pursuance of the order of the court made at the last term, they caused a notice of the time, place, and terms of sale of said property in the petition mentioned (as well as in the order
43 of sale) to be advertised, according to law, in the Missouri Republican, a newspaper printed in the city and county of St. Louis, for at least twenty days previous to the day of sale, a copy of which notice is herewith returned as a part of this report; and that such notice having been duly advertised, they did, on the fifth day of June, eighteen hundred and thirty-seven, being the first Monday of that month, at the hour of eleven o'clock of that day, commence upon the premises making said sale, according to the terms and conditions specified in said order, having first subdivided the premises to be sold into lots of a convenient size, as appears from the plat hereto annexed as a part of this report; that the lots numbered from one (1), consecutively, up to nineteen (19), inclusively, together with seven and a half feet of the alley the whole length on the north, and including the alley twenty feet wide, together with a small
44 space between the front lots and the river, compose the premises in the petition mentioned and ordered to be sold; that for the purposes of the sale, the commissioners, deeming it for the best, laid off the alley of twenty feet, as appears on said plat, and also left unsold, to form a part of an alley along the north end of the lots from No. (5) five to No. (19) nineteen, inclusive, the width of seven and a half feet; but there as yet no agreement of the neighboring proprietors, to the knowledge of the commissioners, to give the proper portion of their ground to said alley. The commissioners supposed that the property would sell to better advantage by being laid out, as in said plat, with the alley, and the space between the front lots and the river makes a part of the said front lots as sold to said Waddingham; and the said commissioners having commenced said sale as aforesaid, continued the same, conforming in all respects to the order of sale, and striking off the lots to the highest
45 bidder, until the whole were sold, all of which was done on the premises and on the day aforesaid; and the said lots were then and there struck off to the highest bidder, and sold to the persons mentioned as purchasers in the tabular statement hereto annexed (signed by R. Paul) as a part of this report, and for the prices set opposite to their names respectively, which tabular statement is a true and correct statement of the names of the purchasers, number, & size of the lots sold, except so far as the sizes are differently stated or modified herein, and the prices at which they were sold respectively.

And the said commissioners further state that as to the seven and a half feet left in the north of the lots from number five (5) to number (19) nineteen, that the purchasers of said lots, said Waddingham & Laveille, are willing that the deeds shall be given including the W. (torn off) depth of the ground to the adjoining lands,
46 which these commissioners think reasonable and proper, &

report accordingly, and pray that said deeds may be so made, leaving no space there for an alley.

M. P. LEDUC,
EDW'D TRACEY,
WM. GLASGOW,
Com'rs.

COUNTY OF ST. LOUIS, *ss:*

Mary P. LeDuc, Edward Tracey, & William Glasgow, above-named commissioners, being sworn on their oaths, say: That the foregoing report of sales is true.

M. P. LEDUC,
EDW'D TRACEY,
WM. GLASGOW,
Com'rs.

Sworn to & subscribed before me, this 28 July, 1837.
JOHN RULAND,
Clerk C't C't.

(Here follows diagram, marked page 47.)

48 (*Advertisement*) *Real Estate for Sale.*

STATE OF MISSOURI, }
County of St. Louis, } *ss:*

In the Circuit Court of St. Louis County. March Term, 1837.

On partition, William Waddingham, Henry M. Wheeler, Ann Eliza Wheeler, Levina Wheeler, Joseph C. Laveille, and Levina, his wife.

Order of Sale.

Pursuant to an order of sale of the circuit court of the county aforesaid, of March term, 1837, the undersigned, commissioners, appointed by said court, will on the first Monday (being the fifth day) of June next, at the hour of ten of the clock of that day, expose to sale at public vendue or auction, to the highest & best bidder, the following real estate, to wit: A certain lot or piece of ground, in central St. Louis, about one mile north of the city of St. Louis, and containing 137 feet 6 inches, fronting eastwardly by river Mississippi, southwardly by Payne street, westwardly by ———, and northwardly by land of the heirs of Samuel McKee; which said lot
49 or piece of ground has been subdivided into lots of different sizes, a plat of which will be exhibited on the day of sale.

Sale to be on the premises, on the following terms, to wit: One-fourth of the purchase-money to be paid in hand, one-fourth in six months, one-fourth in twelve months, and one-fourth in eighteen months, from the day of sale; to be secured by notes and mortgages, or deeds of trust upon the property sold.

Dated St. Louis, April 27th, '37.

M. P. LEDUC,
EDWARD TRACEY,
WILLIAM GLASGOW,
Commissioners

M. 5 wtds.

STATE OF MISSOURI, } ss:
County of St. Louis, }

Personally approved before the undersigned, a justice of the peace within and for the county aforesaid, N. Paschall, who, being duly sworn, deposeth and saith: That the annexed advertisement was published in the Missouri Republican, the newspaper of which he was at the time printer, for four weeks successfully, the first insertion being on the sixth day of May, 1837, and the last insertion on the twenty-seventh day of May, 1837, as follows, to wit: In No. 2, May 6; in No. 3, May 13; in No. 4, May 20; in No. 5, May 27.

N. PASCHALL.

Sworn to and subscribed before me, this 28th of July, 1837.
P. WALSH, *J. P.*

List of Lots in Blocks Nos. 234 & 241, *Sold by Messrs. M. P. LeDuc, Edward Tracey & Wm. Glasgow, Commissioners to Make Partition or Sell the Same.*

Names of Purchasers.	No. of the lots.	Size.	Price per foot.	Amounts.
William Waddingham	No. 1	49 ft. 8 in. by 119	1 70 drs.	$8,443 33¾
Same	2	29½ by 119½	1 50 "	4,375
Same	3	Same	1 50 "	4,375
Same	4	Same	2 00 "	5,833 33¾
Joseph C. Laveille	5	30 by 129	70 "	2,100
Wm. Waddingham	6	Same	51 "	1,530
Joseph C. Laveille	7	Same	50 "	1,500
Wm. Waddingham	8	Same	50 "	1,500
Same	9	Same	49 "	1,470
Same	10	Same	50 "	1,500
Joseph C. Laveille	11	Same	70 "	2,100
Same	12	Same	40 "	1,200
Wm. Waddingham	13	Same	45 "	1,350
D'to	14	Same	45 "	1,350
D'to	15	d'to	45 "	1,350
Joseph C. Laveille	16	d'to	46 "	1,380
Wm. Waddingham	17	65 ft. by 129	1 33 "	8,645
D'to	18	29 6/12 by 129	45 "	1,327 50
Joseph C. Laveille	19	Same	48 "	1,416
Total				$52,745 16¾

I do hereby certify that the above list is correct.
June 5th, 1837. R. PAUL.

R. Paul, for surveying, comprehending all the expenses thereof, plans, &c. $30 00
Do. for selling said lots 40 00

The plaintiffs objected, for the reasons that plaintiffs, and those

under whom they derive title, were not served with notice in said cause, were not parties thereto, and the said proceedings were void as to them, which said objections the court overruled; to which said action of the court, in overruling said objections, the plaintiffs then and there excepted.

52 Defendants then offered in evidence a commissioner's deed, which is in words and figures following, to wit:

Com's' Deed.

This deed, made at the city and county of St. Louis, in the State of Missouri, this — day of August, in the year of our Lord one thousand eight hundred and thirty-seven, by and between Mary Philips LeDuc, Edward Tracey, and William Glasgow, commissioners appointed by the circuit court of St. Louis county, to make partition of certain real estate between William Waddingham and Henry M. Wheeler, Ann Eliza Wheeler, Levina Wheeler, and Joseph C. Laveille, and Levina, his wife, parties of the first part, and William Waddington, party of the second part, witnesseth: That whereas the said circuit court, at their March term, in the year eighteen hundred and thirty-seven, did make an order and decree of sale, requiring the said commissioners, the parties of the first part, to sell, at the time and place and in the manner and on the terms in

53 the said order and decree specified, the following real estate belonging to the parties between whom the said commissioners were appointed to make partition of the same, to wit: A certain lot or piece of ground in Central St. Louis, about one mile north of the city of St. Louis, and containing one hundred and thirty-seven feet six inches, fronting eastwardly on the river Mississippi, southwardly by Payne street, westwardly by ———, and northwardly by land of the heirs of Samuel McKee, first having caused the said lot of ground to be subdivided into lots of different sizes, and notice of the time, terms, place, and manner of said sale, to be given at least four weeks successively prior to the day of said sale in some newspaper printed and published in the said city of St. Louis; and whereas, in compliance with the requisitions of said order and decree of sale, the said commissioners did cause the said piece of

54 land to be subdivided by Reni Paul, city surveyer of the city of St. Louis, into nineteen lots of different sizes, a plat of which said subdivision was made out by the said Reni Paul under his hand, and appended to and made a part of the report of said commissioners, by them made to the said court as hereinafter stated, on which said plat, as by reference thereto, will more fully appear, said lots, so subdivided, are numbered progressively from one (1) to nineteen (19), inclusive; and whereas, in further compliance with the requisitions of said order and decree of sale, the said commissioners, by advertisement published for four weeks successively prior to the time of said sale, in the Missouri Republican, a newspaper printed and published in the city of St. Louis aforesaid, did give notice of the time, terms, and place of said sale, and of the property to be sold; and whereas the said commissioners caused said

55 land to be subdivided as aforesaid, and notice to be given as

aforesaid, did, on the fifth day of June, in the year of our Lord one thousand eight hundred and thirty-seven, on the premises, at the hour of eleven o'clock in the forenoon of that day, commence the sale of said premises, and did then and there offer the lots of ground, so as aforesaid subdivided, for sale at public vendue or outcry to the highest bidder upon the terms mentioned in the said order and decree of sale, to wit: One-fourth of the purchase-money cash, one-fourth in six, one-fourth in twelve, and the remaining fourth in eighteen months from the day of sale, to be secured by notes and mortgage or deed of trust upon the property sold; and having then and there offered the said lots of ground for sale, as aforesaid, for a long time, and as long as any person would bid therefor, William Waddingham, the party of the second part, became and was the highest and best bidder for the following described lots of
56 ground, being parts of the lots subdivided as aforesaid, at the following prices, and the same were adjudged and struck off to him accordingly, viz: Lot number one (1), containing forty-nine feet eight inches front, and running back one hundred and nineteen feet, at the price and sum of eight thousand four hundred and forty-three dollars and thirty-three and one-third cents; lot number two (2), which immediately adjoins lot number one on the south, containing twenty feet two inches front by one hundred and nineteen feet six inches in depth, at the price and sum of four thousand three hundred and seventy-five dollars; lot number three (3), which immediately adjoins lot number two on the south, and contains the same number of feet front and deep of lot number two, at the price and sum of four thousand three hundred and seventy-five dollars; lot number four (4), which immediately adjoins lot number
57 three on the south, forming the southeast corner of the block, and containing twenty-nine and a half feet front by a depth of one hundred and twenty feet on Payne street, at the price and sum of five thousand eight hundred and thirty-three dollars 33½-100; said lots being all bounded east by the Mississippi river and west by an alley twenty feet wide; also, lot number six (6), at the price and sum of fifteen hundred and thirty dollars; lot number eight (8), at the price and sum of fifteen hundred dollars; lot number nine (9), at the price and sum of fourteen hundred and seventy dollars. Lot number ten (10), at the price and sum of fifteen hundred dollars; lot number thirteen (13), at the price and sum of thirteen hundred and fifty dollars; lot number fifteen (15), at the price and sum of thirteen hundred and fifty dollars; each of said lots containing a front of thirty feet southwardly on Payne street, and a depth northwardly of one hundred and thirty-seven feet six inches;
58 also, lot number seventeen (17), containing sixty-five feet front on Payne street by one hundred and thirty-seven feet six inches in depth, at the price and sum of eight thousand six hundred and forty-five dollars; also lot number eighteen (18), containing twenty-nine feet six inches fronting on Payne street by one hundred and thirty-seven and a half feet in depth, at the price and sum of thirteen hundred and twenty-seven dollars and fifty cents; for a minute and particular description of the locality and boundaries of

which said lots so adjudged to the said party of the second part reference is made to the plat of subdivision above mentioned, which plat, however, is not to govern as to the depth of the lots fronting on Payne street, as they run back to the line of the neighboring proprietor, the alley laid down on said plat in the rear of said lots being abolished, as will appear by the report of said commissioners hereinafter mentioned; and whereas, at the July term of said
59 circuit court, to wit, on the twenty-eighth day of July, in the year of our Lord one thousand eight hundred and thirty-seven, the said commissioners, the parties of the first part, did make to said court a full, detailed, and specific report of their proceedings, under and by virtue of said order and decree of sale, to which report is affixed a plat of the subdivision of said tract of land into lots, as aforesaid, made by Reni Paul, city surveyor, and forming part and parcel of said report; which said report was then approved and confirmed by said court, and is now on file in the clerk's office of said court:

Now, therefore, in consideration of the premises, and of the sum of forty-three thousand and forty-nine dollars and sixteen and two-thirds cents, being the aggregate amount of the purchase-money of the lots of ground above described, to us in hand well and truly paid,
60 and secured according to the terms and conditions of said sale, we, the parties of the first part, commissioners as aforesaid, by virtue of the authority vested in us by said order and decree of sale, and in pursuance of said sale, have granted, sold, transfer-ed, and conveyed, and do by these presents grant, sell, transfer, and convey, the lots of ground above described, together with the privileges and appurtenances to the same belonging, unto him, the said William Waddingham, his heirs and assigns, forever; to have and to hold the same to him, the said William Waddingham, his heirs and assigns, forever.

In testimony whereof, we, the above-named Mary Philip LeDuc, Edward Tracey, and William Glasgow, commissioners as aforesaid and parties of the first part, have hereunto set our hands and affixed our seals, at the place and on the day and year first above written.

M. P. LEDUC. [SEAL.]
EDW'D TRACEY. [SEAL.]
WM. GLASGOW. [SEAL.]

Done in presence of—
BENJ. F. McKENNEY.

61 STATE OF MISSOURI, } *ss*:
County of St. Louis, }

Be it remembered that on this twelfth day of September, in the year of our Lord one thousand eight hundred and thirty-seven, before me, a justice of the peace within and for the county aforesaid, personally appeared Mary Philip LeDuc, Edward Tracey, and William Glasgow, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument of

writing as parties thereto, and severally acknowledged the same to be his act and deed for the purposes therein mentioned.

Taken and certified the day and year aforesaid.

BENJ. F. McKENNEY,
Justice of the Peace, St. Louis County.

Filed and recorded March 16th, 1847.

S. D. BARLOW, *Recorder.*

62 To the reading of which said deed in evidence the plaintiffs objected, on the grounds that the proceedings on which said deed was founded are void as to them, they and those under whom they derive title never having been served with notice in said proceedings, nor were they parties thereto; and further said deed does not embrace the premises described in the plaintiffs' petition; which said objections the court overruled, for the reasons that the deed was sufficient to convey all the land therein described, but did not convey or describe the land in dispute; thereupon the plaintiff duly excepted to the overruling of said objections and the deed was read in evidence.

The defendants then offered in evidence quit-claim deeds executed (in consideration of small sums of money specified in the deeds respectively) during the year 1846, and recorded in said county the same year, from said Edward C., Daniel Mc, Thomas J., John B., and James B. Payne to Mary Jones, and from said Mary Jones

63 to Franklin Niles, for the premises described in said suits. To the reading of which said deeds in evidence the plaintiffs objected, on the grounds that none of the grantors had any title, at the time they were executed, to convey, and none of the grantees were or could be innocent purchasers under the facts given in evidence in this cause, and the defendants could not dispute the title of William Waddingham, their grantor, after offering it in evidence and claiming title under it; which said objections were sustained by the court and the deed excluded; to which action of the court the defendants then and there excepted.

Defendants then offered in evidence a deed executed in 1849 by John F. Darley, public administrator, in charge of the estate of Franklin Niles, deceased, made in pursuance of an order of the probate court of the county of St. Louis for the specific execution of a contract made in writing during his lifetime by

64 said Niles to convey the land therein described & describing as bounded east by the Mississippi river, to Benjamin H. Payne, said Niles having died without having executed the same, or provided for its execution in a will, said deed being for the land described in said suits, and to Benjamin H. Payne, and acknowledged before Peter Ferguson, judge of said probate court. To the reading of which said deeds in evidence the plaintiffs objected, on the same grounds urged against the deeds last hereinbefore offered in evidence by defendants, and the further objections that it was not acknowledged in open court, as required by the statute, but simply acknowledged before and certified to by the judge of said probate

court, and is void; which said objections were sustained, and the deed excluded by the court; and to which defendants duly excepted at the time.

Defendants then offered in evidence a quit-claim deed from
65 said Benjamin H. Payne to said William Waddingham, executed in the year 1851, for the premises described in said suits, calling for the Mississippi river as the eastern boundary. To the reading of which in evidence the plaintiffs objected, on the grounds that said Benjamin H. Payne had no title at the time he executed the same to convey, and said William Waddingham was not and could not be an innocent purchaser under the evidence in this cause, and, being a tenant in common with the plaintiffs or their ancestors, he could not purchase an adverse title, if one had existed, for his own benefit; which said objects were sustained, and the deed excluded by the court; & to all which defendants excepted at the time.

Defendants then offered in evidence a quit-claim deed, executed in the year 1868, from said William Waddingham to Richard Schulenberg, and a quit-claim deed, executed in the year 1872, by
66 said Richard Schulenberg to the defendants, The Laclede Gas Light Company, both of said deeds being for the premises described in the petition of plaintiffs herein. Plaintiffs admit that the two deeds last named were sufficient to, and did, convey all of the right, title, and interest of the said William Waddingham, as shown by the evidence herein, in and to the premises described therein from him to said Richard Schulenberg, and from said Schulenberg to said Laclede Gas Light Company, but no more; which said interest of said Waddingham is admitted by plaintiffs to be as much as the undivided one-third of said Chouteau title thereof, but object to them, or either of them, being received in evidence to show that more then the said interest of the said Waddingham in the premises passed thereby, for the reason that neither of the grantors or grantees ever owned more than that interest therein; which said objection the court sustained, but admitted said deeds in evi-
67 dence; to which action of the court, so far as sustaining said objections, defendants at the time excepted.

Defendants then offered in evidence to prove the defendants and those under whom they claim had held the actual, exclusive, public, notorious, continuous, and adverse possession of the premises in controversy, claiming title thereto against all of the world for twenty-four years next preceding the institution of the suit by plaintiffs herein, in which they suffered a nonsuit. To which said evidence the plaintiffs objected, on the grounds, first, that the title to said U. S. survey No. 671 remained in the United States until the passage of the act of Congress on the 6th of June, 1874, read in evidence herein, and it was therefore immaterial, and no defense to this action; second, said premises, or the greater part thereof, were formed by accreation within the period specified, and since the
68 marriage of plaintiff, Levina P. Campbell, and could not have been affected by adverse possession; third, that said John Hartnett held a life estate in said premises, which did not expire until March 15th, 1860, the date of his death, and adverse posses-

sion taken after his marriage with said Ann Eliza could not affect the title or right of recovery of plaintiff, Amelia E. Hartnett, she having instituted the action in which she suffered the nonsuit set forth herein within three years after she arrived at the age of twenty-one years, which said evidence is as follows: That said Haddingham resided and carried on business on the lots laid down on said plat, and passed over, in the course of his business, with waggons, &c., and carried freight and offal to and from the river to his place of business, but never had any building on, or enclosure of, the land lying between the eastern line of the lots as marked
69 on the plat, and the river; that said Schulenberg, at the date of the deed to him, took actual possession of the premises, and the same has been contin-ous ever since. Which said objections of plaintiffs to said evidence in regard to possession the court overruled; to which said action of the court in overruling the same the plaintiffs then and there excepted.

Defendants then proved that the money realized from the partition sale set forth herein had been paid out to the duly and legally appointed and qualified guardians of the persons and estates of Annie L. Murray and Amelia E. Hartnett and Levina P. Campbell, and by them duly accounted for in the probate court of St. Louis county, Missouri, with their other moneys in regular, annual, and final settlements, as such guardians of said funds and estates, by said court approved, and that upon such settlements that the bal-
70 ance had been duly paid over to the husbands of plaintiffs, Annie L. and Levina P., and to said plaintiff, Amelia E. Hartnett; to which said evidence the plaintiffs objected, on the grounds that none of the premises described in the petition of plaintiffs were either sold or pretended to be sold in said proceedings in partition, and there is no evidence tending to show that plaintiffs knew of the source from which moneys were derived, and the husbands of said Levina P. and Annie L. could not bind them so as to convey their real estate by estoppel, which said objections were sustained, & the defendants then and there duly excepted thereto.

Defendants here closed their case.

Plaintiffs then offered the following declarations of law, which were given by the court:

Plff's Ins. Given.

The court declares the law to be that if Edward C. and John B. Payne executed and delivered the deed to Thomas J. and
71 Daniel Mc. Payne, and James B. Payne executed and delivered the deed to Thomas J. Payne, and David Mc. Payne executed and delivered the deed to Thomas J. Payne, and Thomas J. Payne executed and delivered the deed to Edward P Wheeler, copies of which said deeds were offered in evidence by plaintiffs; and said Edward P. Wheeler died October 22, 1832, and left surviving him three children, to wit, Henry M., born September 22d, 1824; Ann Eliza, born May 6th, 1828, and Levina P., born December 6th, 1832 (the latter being a posthumous child) as his only heirs-at-law; and

said Henry M. died in the year 1860, unmarried, leaving his said sister, Levina P., and the children of his said sister, Ann E., as his only heirs; and said Ann E. intermarried with John Hartnett December, 1849, and had two children by said marriage, to wit, Annie L., born November 12, 1850, and Amelia E., born January
72 21, 1854; and said Ann E. died March 30th, 1854, and said John Hartnett died March 15th, 1860, the said Ann E. leaving, surviving her, her said children, Annie L. and Amelia E., as her only heirs; and said Annie L. married with plaintiff, Frank H. Murray, October 21, 1872, and said Levina P. intermarried with George W. Campbell August 4, 1853, and said George W. Campbell died December 5, 1872; the verdict in this cause should be for the plaintiffs; that plaintiff, Levina P. Campbell, recover the undivided five-twelfths of the premises in controversy; that plaintiff, Amelia E. Hartnett, recover the undivided one-eighth thereof, and plaintiffs, Ann L. and Frank H. Murary, recover the undivided one-eighth thereof.

The court declares the law to be that the possession of one tenant in common of a tract of land is presumed to be for the benefit of all the tenants in common of the same, and there is no evidence
73 in this case sufficient to show an ouster of one tenant in common by another tenant in common prior to the date of the deed from Waddingham to Schulenberg offered in evidence by defendants.

The court declares the law to be that under the evidence in this cause, the defendants cannot claim title to the land in controversy, or to any portion thereof, by possession alone.

The court further declares the law to be that the deed offered in evidence by defendants, from William Waddingham to Richard Schulenberg, and from Richard Schulenberg to the Laclede Gas Light Company, conveyed the interest of said Waddingham to the premises in controversy, acquired by him by virtue of the proceedings in chancery of William Waddingham *vs.* Levina Wheeler *et al.*, offered in evidence by defendants, and no more.

The court declares the law to be that any addition made
74 to the land in any or all of the conveyances read in evidence by plaintiff by gradual deposits from the Mississippi river is to be taken and considered as a portion of the land described in such conveyance, from the time such addition was so made or formed, and the title thereto vested in the owner of the shore to which such accreation formed.

The court declares the law to be that none of the following conveyances offered in evidence by defendants conveyed to or vested in the respective grantees therein named, or any of them, any title to the premises in controversy, to wit: Edward C. Daniel McThomas, J. John B., and James B. Payne, to Mary Jones, Mary Jones to Franklin Niles, Franklin Niles by adm'r to Benjamin H. Payne, and Benjamin H. Payne to William Waddingham.

The court further declares the law to be that the evidence in this cause does not establish any fact by which the plaintiffs
75 or either of them is estopped from claiming title in the premises in controversy.

The court declares the law to be that the proceedings in chancery in the case of William Waddingham *vs.* Levina Wheeler *et al.* were and are void as to plaintiff, Levina P. Campbell, and did not divest her of any portion of her title in the premises described therein.

The court further declares the law to be that the commissioner — deed offered in evidence by the defendants does not embrace any portion of the premises described in the petition of plaintiffs, and that the same extends to and embraces only the land in the lots as laid off in the plat attached to the report of the commissioners offered in evidence by the defendants, and no more.

To which action of the court, in giving said instructions, the defendants at the time objected and excepted.

76 *Def't Instruct's Given.*

Defendants then offered the following declarations of law which were given by the court: If Waddingham & his 4 representatives took actual possession of the greater part of the premises sold and conveyed to him in 1836, and have continued to hold the same ever since; and if he and they used and occupied the part of the premises next to the river, and which is the premises in dispute in this case, in the only manner in which the same could be used and possessed, and during all that time notoriously claimed the same as part and parcel of the premises so bought by and belonging to them, the plaintiff cannot recover.

Def'ts Ins. Refused.

To which action of the court in giving said instructions and each of them, the plaintiffs, at the time objected & excepted, and the defendants asked the court to dectare the law as follows:

77 1. The court is requested to declare as matter of law that the plaintiff is not entitled to recover on the evidence in this case.

2. The copies of the record of the deeds from the heirs of Benjamin Payne to Thomas J. Payne are not competent evidence, and are not sufficient to prove title in the plaintiff's ancestor, as of the land therein described.

3. The proceedings and sale in partition in the case of Waddingham *vs.* Wheeler *et al.*, given in evidence by the defendant, divested the plaintiffs of any title claimed by them under Wheeller to the premises, which the court refused, and the defendants at the time duly excepted to such refusal.

And on the 19th day of January, 1880, the court gave a verdict in said cause, and rendered judgment thereon in favor of plaintiffs.

78 And within four days thereafter, to wit, on the 22d day of Jan'y, 1880, the said defendants filed a motion for a new trial in this cause, which is in words and figures following:

Mo. for New Trial.

In the Circuit Court for the City of St. Louis.

STATE OF MISSOURI, } ss:
City of St. Louis, }

LEVINA CAMPBELL *et al.*
vs.
THE LACLEDE GAS LIGHT CO. and THE CITY OF ST. LOUIS. } Case No. 41651 in Court Room No. 1.

Now come the defendants and move the court to set aside the verdict and judgment heretofore rendered in this cause, and for a new trial.

1. The verdict and judgment are against the evidence presented at the trial.
2. The verdict was against the weight of evidence.
3. The verdict and judgment were against the law.
4. Because under the evidence presented the verdict and judgment should have been in favor of the defendants.
5. Because the court erred in giving instructions asked by
79 plaintiff; also erred in refusing instructions asked by defendants.

CHARLES GIBSON AND
LEVERETT BELL,
Att'ys for Defendants,
By V. W. KNAPP, *Att'y.*

Which said motion the court, on the 2d day of Febr., 1880, overruled, to which said action of the court in overruling said motion the said defendants at the time excepted, and bring this their bill of exceptions, and ask that the same be signed and sealed and made part of the record in this case, which is done accordingly; and it is further agreed by the parties that the foregoing and the record herein contains a statement of the cause of action, the defence, and the evidence herein together with the rulings of the court thereupon; and I certify that the same is a substantial history of what occurred at the trial of this cause.

Witness my hand and seal this 18th day of Febr'y, 1880.

ELMER B. ADAMS, *Judge.* [SEAL.]

80 *Aff. & Bond for App'l, L. G. L. Co.*

In the Circuit Court.

LEVINA P. CAMPBELL *et al. vs.* THE LACLEDE GAS LIGHT COMPANY.

Affidavit for appeal.

STATE OF MISSOURI, } ss:
City of St. Louis, }

Charles Gibson, being duly sworn, makes oath and says that the appeal prayed for in the above-entitled cause is not made for vexa-

tion or delay, but because the affiant believes that the appellant is aggrieved by the judgment or decision of the court.

C. GIBSON,
Att'y for The Laclede Gas Light Co.

Sworn to and subscribed before me, this 18th day of February, A. D. 1880.

CHAS. F. VOGEL, *Cl'k.*

Know all men by these presents, that we, The Laclede Gas Light Company, as principal, and Charles Gibson and John Magwern, as sureties, are held and firmly bound unto Levina P. Campbell, and Frank H. Murray and wife, and Amelia E. Hartnett,
81 in the sum of one thousand dollars, for the payment of which, well and truly be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated at St. Louis, this 18th day of February, A. D. 1880.

The condition of the above obligation is such that whereas said Laclede Gas Light Company has appealed from the judgment rendered against it, and in favor of said Campbell and others in the circuit court, city of St. Louis, for the sum of one hundred and ninety-six $\frac{47}{100}$ dollars damages, together with costs and monthly value of three $\frac{33}{100}$ doll's, and for possession of property described in the petition. Now if said appellant shall prosecute its appeal with due diligence to a decision in the St. Louis court of appeals, and shall perform such judgment as shall be given by the St. Louis court of appeals, or such as the St. Louis court of appeals may direct
82 the circuit court, city of St. Louis to give, and if the judgment or any part thereof be affirmed, will comply with and perform the same so far as it may be affirmed, and pay all damages and costs which may be awarded against it by the St. Louis court of appeals, then this obligation to be void; otherwise to remain in full force and effect.

LACLEDE GAS LIGHT CO.,
By J. F. MAGWERN, *Vice Pres.* [SEAL.]
C. GIBSON. [SEAL.]
J. F. MAGWERN. [SEAL.]

Approved in open court Feb. 18th, 1880.

CHAS. F. VOGEL, *Cl'k.*

And afterwards, at the February term, A. D. 1880, of the said circuit court, city of St. Louis, the following further proceedings were had in said cause, to wit:

Aff. & Bond for Appeal Filed by City of St. Louis & Granted.

THURSDAY, *February* 19, 1880.

LEVINA CAMPBELL *et al.*
vs.
THE LACLEDE GAS LIGHT CO. and THE CITY OF ST. LOUIS. } 41651.

Now comes the defendant, The City of St. Louis, by attorney, and

files an affidavit for an appeal, and on his motion an appeal
83 is allowed it to the St. Louis court of appeals from the judgment herein rendered, he thereupon files an appeal bond which is approved by the court.

Which said affidavit and bond for appeal are respectively in words and figures following, to wit:

Aff't & Bond for Appeal of City of St. Louis.

STATE OF MISSOURI, }
City of St. Louis, } ss:

Henry Overstolz, mayor of the city of St. Louis, being duly sworn, makes oath and says, that the appeal prayed for in the above-entitled cause, is not made for vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment or decision of the court.

HENRY OVERSTOLZ, *Mayor.*

Sworn to and subscribed before me, this nineteenth day of February, A. D. 1880. I was qualified for a term expiring May 27, 1881.

[SEAL.] FREDERICK F. ESPENCHILD,
Notary Public, City of St. Louis, City and County, Missouri.

84 Know all men by these presents, that the city of St. Louis, as principal, is held and firmly bound unto Levina Campbell, Frank H. Murray, Annie L. Murray, and Amelia E. Hartnett, in the sum of one thousand dollars, for the payment of which well and truly to be made, it binds itself firmly by these presents. Sealed and dated at St. Louis, this 19th day of February, A. D. 1880.

The conditions of the above obligation is such that whereas the city of St. Louis has appealed from the judgment rendered against it, and in favor of the said Levina Campbell *et al.*, in the circuit court of the city of St. Louis, for the sum of one hundred and ninety-six dollars and forty-seven cents, together with costs and monthly rents, three $\frac{33}{100}$ dollars. Now said appellant shall prosecute its appeal with due diligence to a decision in the St. Louis court of appeals, and shall perform such judgment as shall be given by the St.
85 Louis court of appeals, or such as the St. Louis court of appeals may direct the circuit court, city of St. Louis, to give, and if the judgment or any part thereof be affirmed, will comply with and perform the same so far as it may be affirmed, and pay all damages and costs which may be awarded against it by the St. Louis court of appeals, then this obligation to be void; otherwise to remain in full force and effect.

HENRY OVERSTOLZ, [SEAL.]
Mayor, for the City of St. Louis.

Approved in open court Feb'y 19, 1880.

CHAS. F. VOGEL, *Cl'k.* [SEAL.]

STATE OF MISSOURI, } ss:
City of St. Louis, }

I, Chas. F. Vogel, clerk of the circuit court, city of St. Louis, do hereby certify the foregoing to be a true, full, and complete transcript of the record and proceedings in the above-entitled cause, as fully as the same remains on file and of record in my office.

86 In testimony whereof, I hereto set my hand and affix the seal of said court, at office in the city of St. Louis, this 24th day of March, 1880.

[SEAL.] CHAS. F. VOGEL, *Clerk.*

And afterwards, at the October term, A. D. 1880, of the St. Louis court of appeals, the following proceedings were had in said cause, to wit:

TUESDAY, *January* 6, 1881.

LEVINA CAMPBELL *et al.*, Respondents, }
vs. } 1880.
LACLEDE GAS LIGHT COMPANY *et al.*, Appellants. }

Now at this day comes Amelia E. Hartnett, one of the respondents in this cause, by her attorney, and suggests to the court that since the granting of the appeal in this cause said respondent, Amelia E. Hartnett, has intermarried with one Charles J. January. Thereupon comes said Charles J. January, by his attorney, and enters his appearance herein as party respondent, assignment

87 of errors filed, stipulation for affirmance of judgment *pro forma.*

Which assignment of error is in the words and figures following, to wit:

Assign't of Error.

In the St. Louis Court of Appeals. October Term, 1881.

LEVINA P. CAMPBELL *et al.*
vs.
THE LACLEDE GAS LIGHT CO. & THE CITY OF ST. LOUIS.

And now comes the said appellants and say that — the record and proceedings of the court below in the above-entitled cause there is manifest error, and for error said appellants assign the following, to wit:

1. That said court admitted improper and illegal testimony offered by plaintiffs.
2. That said court rejected proper and legal testimony offered by plaintiffs.
3. That the court gave to the jury improper and illegal instructions.

88 4. That the court refused to give to the jury proper and legal instructions offered by defendants.

5. That the verdict was against the evidence.
6. That the verdict was against law.

7. That the verdict was against both law and evidence, and against the law under the evidence.
8. That the verdict was against the weight of evidence.
9. That the judgment was rendered for the plaintiffs, when it should have been rendered for the defendants.
—. That said court overruled the motion for a new trial made by defendants.

C. GIBSON AND
LEVERETT BELL,
For Appellants.

And now come the respondents, and for joinder in error say there is no error in the record and proceedings of said St. Louis circuit court in said cause, as assigned by said appellants.

JOHNSON, *For Respondents.*

89 Which stipulation for affirmance of judgment *pro forma* is in the words and figures following, to wit:

Stipulation.

In the St. Louis Court of Appeals. Oct. Term, 1880.

LEVINA P. CAMPBELL *et al.*
vs.
THE LACLEDE GAS LIGHT CO. *et al.*

Marriage of respondent, Amelia E. Hartnett, to Charles J. January suggested, and appearance of said Charles J. January entered in this cause. Judgment affirmed *pro forma.*

E. P. JOHNSON AND
A. R. TAYLOR,
Att'ys for Resp's.
C. GIBSON, *For Appellant.*

And afterwards, at the same term of said court, the following further proceedings were had in said cause, to wit:

TUESDAY, *January* 18, 1881.

LEVINA CAMPBELL, FRANK H. MURRAY, and ANNIE L. MURRAY, his wife, & CHARLES J. JANUARY and ANNIE E. JANUARY, his wife, Respondents,
vs.
THE LACLEDE GAS LIGHT COMPANY, THE CITY OF ST. LOUIS, Appellant-. } 1880.

90 Appeal from the circuit court, city of St. Louis.

Now, at this day, come the said parties, by their respective attorneys, and on their stipulation herein filed it is ordered and adjudged by the court that the judgment rendered herein by the circuit court, city of St. Louis, be in all things affirmed *pro forma*, and stand in full force and effect, and that the said respondents recover of the said

appellants their costs and charges herein expended, and have execution therefor. Opinion filed.

Which opinion is in the words and figures following, to wit:

Opinion of the Court.

In the St. Louis Court of Appeals.

LEVINA CAMPBELL *et al.*, Resp.,
vs.
THE LACLEDE GAS LIGHT CO. *et al.*, App.

Appeal from St. Louis circuit court.

In accordance with a stipulation signed by the counsel on
91 both sides, and filed in this cause, the judgment of the circuit court is affirmed *pro forma*, without examination of the questions or merits appearing upon the record.
All the judges concur.

EDW'D A. LEWIS.

And afterwards, at the same term of said court, the following further proceedings were had, to wit:

Appeal Granted to Supreme Court.

LEVINA P. CAMPBELL *et al.*
vs.
THE LACLEDE GAS LIGHT CO. and THE CITY OF ST. LOUIS.

Now, at this day, comes the City of St. Louis, by its attorney, and files an affidavit for appeal herein, and on its motion an appeal is granted it to the supreme court of the State of Missouri from the judgment herein rendered. Thereupon it files are appeal bond in the penal sum of two thousand dollars, which bond is by the court approved.

Which affidavit for appeal and appeal bond are, respect-
92 ively, in the words and figures following, to wit:

Affidavit for Appeal.

In the St. Louis Court of Appeals. October Term, 1880.

CAMPBELL *et al.*
vs.
THE LACLEDE GAS LIGHT COMPANY and THE CITY OF ST. LOUIS, Appellants.

Before St. Louis court of appeals.

STATE OF MISSOURI, *ss:*

Henry Overstolz, mayor of St. Louis, being duly sworn, makes oath and says: That the appeal prayed for in the above-entitled

cause is not made for vexation or delay, but because the affiant believes that the appellants are aggrieved by the judgment or decision of the court.

HENRY OVERSTOLZ.

Sworn to and subscribed before me, this nineteenth day of January, A. D. 1881.

[SEAL.] GEORGE A. SCHULTE,
Notary Public, City of St. Louis, Mo.

Qualified Nov. 19, 1878; Com. expires Nov. 4, 1882.

93 *Bond.*

Know all men by these presents, that the City of St. Louis, as principal, is held and firmly bound unto Levina Campbell, Frank H. Murray, Annie L. Murray, Amelia E. January, and Charles J. January, her husband, in the sum of two thousand dollars; for the payment of which, well and truly to be made, it binds itself firmly by these presents. Sealed and dated at St. Louis, this 19th day of January, A. D. 1881.

The condition of the above obligation is such, that whereas the City of St. Louis has appealed from the judgment rendered against it and in favor of the said Levina Campbell *et al.* in the St. Louis court of appeals:

Now, if said appellant shall prosecute its appeal with due diligence to a decision in the supreme court, and shall perform such judgment as shall be given by the supreme court, or such as the supreme court may direct the St. Louis circuit court, in the city of St. Louis, State of Missouri, to give, and if the judgment or
94 any part thereof be affirmed will comply with and perform the same so far as it may be affirmed, and pay all damages and costs which may be awarded against it by the supreme court, then this obligation to be void; otherwise to remain in full force and effect.

CITY [OF] ST. LOUIS, [SEAL.]
Per HENRY OVERSTOLZ, *Mayor.* [SEAL.]

Approved in open court the 20th day of January, 1881.
Attest: JOS. F. BAIER, *Clerk.* [SEAL.]

And afterwards, at the same term of said court, the following further proceedings were had in said cause, to wit:

App'l to Supreme Court.

WEDNESDAY, *January* 26, 1881.

LEVINA P. CAMPBELL *et al.*
vs.
THE LACLED- GAS LIGHT CO. & THE CITY OF ST. LOUIS.

Now at this day comes the Laclede Gas Light Company and files an affidavit for appeal herein, and on its motion an appeal is

95 granted it to the supreme court of the State of Missouri from the judgment herein rendered.

Thereupon it files an appeal bond in the penal sum of two thousand dollars, with Charles Gibson and John H. Maxon as sureties, which bond is by the court approved.

Which affidavit for appeal and appeal bond is in the words following, to wit:

Affidavit for Appeal.

In the St. Louis Court of Appeals. Before St. Louis Court of Appeals, October Term, 1881.

CAMPBELL *et al. vs.* THE LACLEDE GAS LIGHT COMPANY.

STATE OF MISSOURI, *ss:*

Charles Gibson, being duly sworn, makes oath and says: That the appeal prayed for in the above-entitled cause is not made for vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment or decision of the court.

C. GIBSON.

Sworn to and subscribed before me, this 22d day of January, A. D. 1881.

JOS. F. BAIER, *Clerk.*

96 *Bond.*

Know all men by these presents, that we, The Laclede Gas Light Company, as principal, and Jno. H. Maxon and Charles Gibson, as sureties, *is* held and firmly bound unto Levina Campbell in the sum of two thousand dollars; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally.

Sealed with our seals. Dated at St. Louis, this 20th day of January, A. D. 1881.

The condition of the above obligation is such, that whereas The Laclede Gas Light Co. has appealed from the judgment rendered against it and in favor of the said Campbell *et al.* in the St. Louis court of appeals:

Now, if said appellant shall prosecute its appeal with due diligence to a decision in the supreme court, and shall perform such judgment as shall be given by the supreme court, or such as the supreme court may direct the St. Louis circuit court, in the city of St. Louis, State of Missouri, to give, and if the judgment or any
97 part thereof be affirmed will comply with and perform the same so far as it may be affirmed, and pay all damages and costs which may be awarded against it by the supreme court, then this obligation to be void; otherwise to remain in full force and effect.

LACLEDE GAS LIGHT CO.,
By JOHN H. MAXON, *Pres't.* [SEAL.]
C. GIBSON. [SEAL.]
JNO. H. MAXON. [SEAL.]

This bond is satisfactory to me.

E. P. JOHNSON, *Att'y.*

Approved in open court the 26th day of January, 1881.
Attest: JOS. F. BAIER, *Clerk.*

STATE OF MISSOURI, *ss:*

I, Joseph F. Baier, clerk of the St. Louis court of appeals, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record and proceedings in the above-entitled cause, as fully as the same remain of record and on file in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said court, at office, in the city of St. Louis, this 9th day of February, A. D. 1881.

JOS. F. BAIER, *Clerk.*

And afterwards, to wit, on the 22nd day of October, A. D. 1883, the following further proceedings were had in said cause, to wit:

Appeal from St. Louis Court of Appeals.

LEVINA CAMPBELL *et al.*, Appellants,
vs.
CITY of ST. LOUIS *et als.*, Respondents.

Now at this day comes the city of St. Louis, by attorney, and upon its motion it is considered and adjudged by the court that the appeal taken herein by the city of St. Louis be, and the same is hereby, dismissed.

And afterwards, to wit, on the 26th day of October, the following further proceedings were had in said cause, to wit:

Appeal from St. Louis Court of Appeals.

LEVINA CAMPBELL *et al.*, Respondents,
vs.
THE LACLEDE GAS LIGHT COMPANY, Appellant, and THE CITY OF ST. LOUIS, Respondent.

Now at this day comes the appellant, The Laclede Gas Light Company, and after argument herein submits this cause to the court. Also comes The City of St. Louis, respondent herein, and submits this cause to the court on briefs.

And afterwards, to wit, on the 21st day of November, 1883, the following further proceedings were had in said cause, to wit:

Appeal from St. Louis Court of Appeals.

LEVINA CAMPBELL *et al.*, Respondents,
vs.
THE LACLEDE GAS LIGHT COMPANY *et al.* Appellant.

Now at this day it is ordered that this cause be referred to the commissioners.

99 And afterwards, to wit, on the 11th day of February, A. D. 1884, the following further proceedings were had in said cause, to wit:

Appeal from St. Louis Court of Appeals.

LEVINA CAMPBELL, FRANK H. MURRAY, and ANNIE L. MURRAY, his wife, and CHARLES J. JANUARY and ANNIE E. JANUARY, his wife, Respondents,

vs.

THE LACLEDE GAS LIGHT COMPANY and THE CITY OF ST. LOUIS, Appellant.

Now at this day come again the parties aforesaid by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, do consider and adjudge that the judgment aforesaid in form aforesaid by the said St. Louis court of appeals rendered be reversed, annulled, and for naught held and esteemed, and that the said appellant be restored to all things which it has lost by reason of the said judgment. It is further considered and adjudged by the court that the said cause be remanded to the said St. Louis court of appeals with directions to that court to enter a judgment herein reversing the judgment of the circuit court, city of St. Louis, and remanding this cause to said court for further proceedings to be had therein in conformity with the opinion of this court herein delivered.

And it is further considered and adjudged by the court that the said appellants recover against the said respondents its costs and charges herein expended, and have therefor execution.

(Opinion filed.)

Which said opinion is in the words and figures as follow to wit:

100 *Report of Commissioners*

In the Supreme Court of Missouri, October Term, 1883.

LEVINA CAMPBELL *et al.*, Respondents,

vs.

LACLEDE GAS LIGHT COMPANY, CITY OF ST. LOUIS, Appelants.

Appeal from the St. Louis court of appeals.

MARTIN, C.: On the 5th of January, 1877, the plaintiffs sued in ejectment to recover a tract of land in United States survey 671, situated in the city of St. Louis, immediately north of Mullanphy street, fronting about 137 feet on the Mississippi river, and running back from it with the same width to the depth of about 200 feet. The petition is in the usual form, The Laclede Gas Light Company made separate answer, denying specifically the allegations of the petition. The city of St. Louis in its answer put in issue the allegations of the petition, and pleaded the statute of limitations. The trial, which was by the court, resulted in a judgment for the plaintiffs, in which Levina Campbell recovered $\frac{1}{24}$, Annie L. Murray, $\frac{3}{24}$, and Amelia E. Hartnett, $\frac{3}{24}$ of the land sued for. Separate

bonds were given and separate appeals prosecuted by the defendants respectively. In the court of appeals the judgment was affirmed without argument, *pro former*. After appeal by both defendants to this court the city of St. Louis compromised its interest in the defence by purchasing from the plaintiffs their whole interest and estate in the land, and dismissing its appeal. By this movement the city of St. Louis took the place of the plaintiffs as to the remaining defendant, and the case now stands as between the city of St. Louis, assignee of the plaintiffs, and the Laclede Gas Light Company, sole defendant. In passing upon the questions contained in the record reference will be had to the attitude of the parties as it existed in the trial below below. The premises
101 sued for are part of a larger tract conceded to Pierre Chouteau in 1799, and confirmed to him by the old board of commissioners in 1811. A certificate of the date of the confirmation was issued to him certifying, that he was entitled to a patent under the provisions of the act of Congress of March 3rd, 1807. This confirmation was duly surveyed and the survey, numbered 671, corresponding with the number of the certificate, was returned to and filed in the office of the recorder of land titles for the United States on the 2nd of April, 1817. After submitting these documents in evidence the plaintiffs read the act of Congress approved June 6th, 1874, entitled "An act for obviating the necessity of issuing patents for private land claims, and for other purposes;" also the act of the General Assembly of the State of Missouri, approved March 24th, 1875, entitled "An act concerning the act of Congress of June 6, 1874." Sess. Acts 1875, p. 85. There was no controversy about the original title; and it was admitted by all parties that the premises in dispute were embraced in the said confirmation and survey, as well as in the two records of suits subsequently introduced by the defendants in evidence. It was also admitted that the title of Pierre Chouteau to the land in controversy became vested by regular conveyances on or before Oct. 1, 1821, absolutely in Edward C. Payne, Daniel Mc. Payne, Thomas J. Payne, John B. Payne, and James B. Payne. Both plaintiffs and defendants claim title under these parties.

The plaintiffs' chain of title extends down from these parties, as follows:

1. A conveyance from Edward C. Payne & John B. Payne to Thomas J. Payne and Daniel Mc. Payne, dated Oct. 4, 1828, and recorded Oct. 30, 1828.

2. A conveyance from James B. Payne to Thomas J. Payne, dated Oct. 11, 1829, and recorded Dec. 15, 1829.

3. A conveyance from Daniel Mc. Payne to Thomas J. Payne,
102 dated June 14, 1831, and recorded June 30, 1831.

4. A conveyance from Thomas J. Payne to Edward P. Wheeler, Aug. 1, 1831, & recorded Oct. 10, 1831.

5. Evidence of the death of Edward P. Wheeler, Oct. 22, 1832, leaving as his surviving issue Henry M., Ann Eliza, and Levina, who was a posthumous child; evidence also of the death of Henry

M., without issue; of the marriage and death of Ann Eliza, leaving issue, Annie L. Hartnett, the wife of F. H. Murray, and Amelia E. Hartnett, who, along with Levina Campbell, compose the surviving heirs of Edward P. Wheeler, and are parties plaintiffs in this case.

6. It was also proved by plaintiffs that all the land sued for in the case, except a strip of about 9 to 15 feet wide off the west side of the tract, had been made by accretions from the river since 1853.

The defendant's chain of title was as follows:

1. Record of a suit in chancery by William Waddingham against the widow and infant children of Edward P. Wheeler, in which a decree was entered May 20th, 1834, vesting one-half of the Wheeler title to this real estate in said Waddingham.

2. Record of a suit in partition by William Waddingham against the widow and infant children of Edward P. Wheeler, instituted June 11, 1836. Upon report of commissioners, the court made order of sale at the March term, 1837. On the 5th June, 1837, the order was executed by a sale of the land in controversy to William Waddingham, who received a deed therefor in August, 1837.

3. A conveyance by quit-claim from Waddingham to Richard Schulenberg in 1868.

4. A conveyance by quit-claim from Schulenberg to the Laclede Gas Light Company in 1872.

To strengthen and make good its title the Laclede Gas Light Company also offered in evidence a collateral chain of title, con-
103 sisting of quit-claim deeds from Edward C. Payne, Daniel Mc. Payne, John B. Payne, and James B. Payne to Mary Jones in 1846; also a quit-claim deed from Mary Jones to Franklin Miles in 1846; also a conveyance from the administrator of Miles to Benjamin H. Payne in 1849, and a conveyance by quit-claim from Benjamin H. Payne to William Waddingham in 1851. The defendants also gave in evidence a copy, certified by the recorder of St. Louis county, of a patent of the United States to Pierre Chouteau for the land, issued March 26, 1824, and recorded in St. Louis county in 1847. This was submitted in evidence for the purpose of proving that the legal title was out of the Government as early as 1824 or 1847, so as to admit the effect of the plea of statute of limitations as against the plaintiffs, who contended that the legal title was not parted with by the Government till 1874, by virtue of the act of that date, passed for the purpose of obviating the necessity of issuing patents. The certified copy showed a seal, but an exemplified copy from Washington failed to disclose a seal to the instrument as appearing on the records there. In this statement I have not aimed to describe definitely the character of the conveyances and decrees under which the respective parties hold, nor is it necessary to do so except as to such as have been made objective points of attack in the briefs and arguments submitted to us. The defendants objected to the certified copies of the deeds from Edward C., Daniel Mc., John B., and James B. Payne, under which Thomas J. Payne acquired their titles in 1828, 1829, and 1831. The deed of August 1, 1831, by which he transmitted title to Edward P. Wheeler, was not

objected to. The acknowledgment appearing on the deeds so objected to was in the following form: "I (naming the officer) do certify that this deed from (naming the grantor) to (naming the
104 grantee) was this day produced to me in my office, and acknowledged by said (naming the grantor) to be his act and deed. Whereupon the same, together with this certificate, is certified to the proper officer for record. In testimony whereof I have hereunto set my hand and affixed the seal of said county this — day of ——, ——."

This acknowledgment is defective in failing to state that the grantor was personally known to the officer taking it to be the same party subscribing the deed. It was contended on the part of plaintiffs that the copies were admissible under the curative effect of sections 2305 and 2306 of the statutes, inasmuch as the originals had been recorded more than thirty years before the copies were offered in evidence. If the objection was well taken, it would defeat four-fifths of the title upon which plaintiffs recovered. It is evident that section 2305 is a continuation, as it were, of the act of Feb'ry 2, 1847, which was passed for the purpose of quieting vexatious land litigation, with some slight changes in its phraseology. The language of this section on its face purports to make such copies as offered in evidence in this case, proof of notice of the originals as to all persons. But it has been held that the provisions of the act of 1847 must be so construed and applied as "not to defeat a title regular in every particular, acquired in good faith, and for a valuable consideration," prior to the passage of the act. (Gatewood *vs.* Hart, 58 Mo., 261.) Now, the acquisition of title by the Laclede Gas Light Company from Schulenberg was in 1872, and Schulenberg acquired from Waddingham in 1868. These conveyances were both after the passage of the act, and *prima facie* within its operation and effect. But it is argued, with good reason, that the defendant must be conceded the same right of title which was possessed by any of the grantors who passed the title down to him.

105 Now, while it is true that Waddingham acquired title prior to the passage of the curative act, yet the relation which he held to these conveyances from the Paynes, from 1834 to 1851, necessarily excludes him and his title from the exception to the operation of the curative act defined in Gatewood *vs.* Hart. It is admitted of record that the true title was in the Paynes—that is, the Chouteau title. Waddingham, by virtue of his chancery suit against the Wheeler heirs, acquired and held this very title from 1834 to 1851. It is admitted that this title was in the Paynes. The petition and decree in the suit recite the Wheeler title as coming from Thomas J. Payne, who could have the true title only by virtue of deeds of conveyance from the other Paynes. Waddingham, could not after the admission that the true title was in the Paynes, claim any interest in it by virtue of his chancery suit against the Wheeler heirs, without virtually admitting and maintaining that the Paynes had parted with their title by deeds sufficient to vest it in Wheeler. He must necessarily admit that the title passed by valid conveyances from the persons, in whom it is admitted of record it was once vested

to E. P. Wheeler, from whom he claims to have derived it. Actual and valid conveyances from the Paynes to Wheeler constitute a necessary link in the chain of title under which Waddingham claimed and enjoyed the property from 1834 to 1851. It is evident, therefore, that the curative act so far from defeating this Waddingham title, assists in confirming and maintaining it. It is as beneficial to Waddingham as it would have been to Wheeler. In this aspect of the case the court could not have erred in admitting the copies of the deeds from the Paynes as they appeared of record.

But in another aspect of the case presented in the purchase by Waddingham of the supposed outstanding title originating in subse-
106 quent deeds from the Paynes, the application of the curative statute is not without some difficulty. If Waddingham had in 1846 acquired title immediately from the Paynes he could not have been a purchaser without notice. His relation to their former conveyances burdened him with a notice of them, as already stated. He could not by such purchase acquire a vested title in good faith, which would exempt him, or those claiming under him, after the passage of the statute, from the operation of its curative effect. Such exemptions belong, as we have seen, to innocent purchasers for value. But undoubtedly a person with notice can acquire a good title by or through a person without notice of equities and former conveyances. Now this outstanding title originated in a conveyance by the Paynes to Mary Jones in 1846. The deed to her, as well as the subsequent deed by which Waddingham acquired title, was by quit-claim to the premises. All other deeds in the chain of title to this outstanding claim, which were made prior to 1847, were of the same character. It is a general principle that a quit-claim deed is notice of pre-existing equities. Stibers *vs.* Home, 62 Mo., 437; Mann *vs.* Best, 62 Mo., 491; Ridgeway *vs.* Holliday, 59 Mo., 44. An important exception to this rule has been approved, where the equities are of such a character as the registry acts will apply to; such as can be lawfully spread upon the records. Fox *vs.* Hall, 74 Mo., 315. These former conveyances could not properly be recorded until another acknowledgment or proof of their execution. But granting that they fell within the exception, so far as concerning their general character, on the ground that what was wanting to admit them to record was within the power of the parties to them to supply, they are, in my judgment, wanting in another and very essential element necessary to exempt them from the operation of the rule which makes a quit-claim deed notice of outstanding equities. They must have been for value paid
107 and parted with, to keep them within the exception to the rule. Such is the import of Fox *vs.* Hall. The deeds themselves are not in the record. Neither does it appear that they contained receipts acknowledging payment of the consideration. Instead of the deeds and proper recitals, raising *prima facie* proof of the payment of value, the counsel have contented themselves with the following statement:

"The defendants then offered in evidence quit-claim deeds executed (in consideration of small sums of money specified in the deeds, respectively) during the year 1846, and recorded in said

county the same year, from said Edward C., Daniel Mc., Thomas J., John B., and James B. Payne to Mary Jones, and from said Mary Jones to Franklin Miles." I do not think this statement is equivalent to the proof of payment of value, which was necessary to exempt them from the general rule making quit-claim deeds notice of pre-existing equities.

It has been argued by counsel for plaintiffs that Waddingham was prohibited from buying in this outstanding title on account of being a tenant in common with plaintiffs. The title would, undoubtedly, enure to them, if it was purchased while he held such relation to them in 1851, when he acquired it from Benjamin H. Payne. Whether he held such relation depends upon the records and deeds by which the defendants claim that the Wheeler title was transferred from the plaintiffs or their ancestors to Waddingham, and the facts of adverse possession by which it was claimed that this relation was terminated long before 1851, matters which we will now consider.

The chancery suit in which Waddingham claims to have acquired an undivided half of the Wheeler title by decree of May 20, 1834, was originally brought against only two of Wheeler's children. Afterwards, Levina, who is one of the plaintiffs here, was born, she being a posthumous child, an amended petition was filed making her a party to the suit; perhaps it should more properly be
108 termed a supplemental bill under the practices of the day. To this bill her mother, as general guardian, made answer. The proceedings in the case fail to show that any summons, writ, or subpœna was ever issued or served upon her. In the absence of such service her guardian had no authority to appear for her or to represent her in the suit. R. R. Co. *vs.* Campbell, 62 Mo., 585; Gibson *vs.* Chouteau, 39 Mo., 536; Hendricks *vs.* McLean, 18 Mo., 32. Therefore the record of this suit as to her was absolutely void, and the decree failed to convey to Waddingham any part of her title, which was one-third of the estate undivided. As to the other children the service was legal, and the decree gave to Waddingham one-half of their two-thirds, which was all that he can legally claim by virtue of the decree. This undoubtedly left him as tenant in common with Lavina and the other two children, having acquired nothing from her, but obtaining one-half of the interests of the other two children, which would make him an owner of one-third of the whole instead of one-half of it as claimed in his suit. This interest was undivided, and he next sues in partition, bringing the suit June 11, 1836, against the same children and their mother, as widow, entitled to dower. Of course in this suit Waddingham claimed that he was entitled to an undivided half interest. Unfortunately for him the service of process in this suit was omitted as to all the children who were all minors at the time. The service of process in partition was governed by the statutes of 1835, which did not provide for issue of writ of summons, but required that a copy of the petition with notice of its intended presentment in court should be served four weeks previous to the term of the court in which it was to be presented on all parties interested in the lands who had not joined

in the petition and on the guardians of such as were minors or of unsound mind. Rev. Stat. 1835, sec. 5, p. 422. A copy of the petition, affidavit, and notice of suit were served on the widow
109 by delivering to her a true copy of the petition and notice, and on Henry M., Ann Eliza, and Levina by delivering a true copy of the petition, affidavit, and notice to Levina Wheeler, their guardian. No other service was had on the minors, and there was no appearance by them or for them by general guardian. The court appointed a guardian *ad litem* who appeared for them, if an appointment under the circumstances authorized him to appear. Under the authority of the decision cited, especially R. R. Co. *vs.* Campbell, 62 Mo., 585, the fact that notice was required to be served on the guardian does not dispense with service of notice on the minor also. It follows, therefore, that the court acquired no jurisdiction over the minor defendants, and the decree of partition as to them is absolutely void and ineffectual in divesting them of their title. So far as the record title is concerned, Waddingham continued tenant in common after the partition as he was before it. Neither would the fact that he purchased the property for himself at the partition sale, and paid into the estates of these minors the full purchase money, effect a transfer of title to him. The equity which is administered by the courts upon void sales of this character is not that of decreeing them valid. The most that it can do is to decree a return of the purchase money, and order an account of rents, profits, and improvements, and adjudge the land subject to a lien for the difference. And this is done only when such equity is pleaded. Henry *vs.* McKirlie, decided at October term, 1883. There are no facts in this case upon which an estoppel on the defendants in the partition case can be based. The fact that they were minors would relieve them from the binding effect of such facts if they existed.

But it is claimed by defendants that while the partition proceedings and commissioner's deed in pursuance of them may be
110 ineffectual to divest title, they are sufficient to establish a color of title by which Waddingham and his successors have enjoyed and used the land adversely to the plaintiffs and their ancestors ever since the sale in partition in June, 1837. This brings us to the statute of limitations, which involves the most important questions in the case. It is a general rule that the statute must be pleaded by those who invoke its benefits. The Laclede Gas Light Company did not plead it, and the city of St. Louis, which did plead it, has compromised its case, released all errors, and actually dismissed its appeal, which removes from our consideration all errors made as against the city alone. But it has been held that the action of ejectment constitutes an exception to the rule, which requires the statute to be pleaded in order to admit of the defense secured in it to proprietors of land whether defending or suing. Nelson *vs.* Broadhock, 44 Mo., 596. Before going into the merits of the defence of the statute of limitations, it becomes necessary to dispose of a preliminary objection raised by the plaintiffs to the running of the statute prior to 1874. It is contended by plaintiffs that the legal title had not passed from the Government until the passage of the

act for obviating the necessity of issuing patents, which was approved in 1874, while the defendants contend that the legal title was out as early as 1824. In proof of their position they submitted a copy of the patent to Pierre Chouteau of that date, certified by the recorder of St. Louis county. It is regular in all respects and shows an authentication under seal. The statutes of this State make such copies *prima facie* evidence of the contents of the patents so certified. Sec. 3826, 3827, Rev. Stat., 1879. To impeach the validity of this paper the plaintiffs submitted in evidence an exemplified copy from the records of the Land Office at Washington of a patent cor-
111 responding in all respects with the one proved by defendants, except that it was wanting in a seal.

A letter from the Commissioner of the Land Office appears in evidence, in which he writes that the record was truly copied, and that a seal was probably affixed to the patent, but had been omitted in copying it into the record. He also confesses himself unable to correct the record unless the original be produced. On what principle this letter was admitted in evidence I am unable to discover from the bill of exceptions. It is argued by counsel for plaintiffs that recording in the Land Office at Washington was a necessary condition to a grant by patent; and that the patentee, if he held at all, was holder of a title by record. It is also urged that as the laws of the United States, besides requiring the patent to be recorded, declared that the record should be of equal dignity with the patent, the exemplified copy of the record at Washington must equally with the original impeach any copy made elsewhere. (Rev. Stat. U. S., Sections 458, 459, 891.) I am not very much impressed with the force of this position. The law requires a patent to be signed and sealed. It also requires the recorder of the Land Office to countersign it and attend to the engrossing, recording, and transmission of it to the grantee. That section, which declares copies from the record to be of equal dignity with the patents themselves, was intended only to obviate the necessity of producing the originals or accounting for them before making use of the copies of the record. In the very nature of things a copy cannot be as reliable as the original. Suppose the original was produced in court and a copy from record also, and the variance of a word between the two papers was apparent, is it not clear that the original would be the superior evidence, and that it would impeach the copy in respect to the variance? In McGarrohan *vs.* Mining Co., 96 U. S., 323, Chief Justice Waite says:

"The failure to record the patent does not defeat the grant.
112 It only takes from the party one of the means of making his proof. If he can produce the patent itself, and that is executed with all the formalities required by the law, he can still maintain his rights under it. He is not, therefore, necessarily deprived of his title because of a defective record. He is in no worse condition with the signatures omitted than he would have been if the description of his land had been erroneously copied, or other mistakes had been made which rendered the record useless for the purpose of evidence. A perfect record of a perfect patent proves the grant, but a perfect record of an imperfect patent, or an imperfect record of a

perfect patent has no such effect. In such case if a perfect patent has in fact issued, it must be proved in some other way than by the record." Clearly when the record fails to prove a perfect patent the grantee or those claiming under it are at liberty to prove the patent by other lawful testimony. In submitting the copy from the St. Louis records the defendants have sought to do this under our statutes, which declare such copies to be *prima facie* evidence of the instruments set forth in the copies. I am at loss to perceive how this *prima facie* evidence is successfully impeached by an imperfect record at Washington. The records of that Land Office had no authority to record a patent without any seal any more than our recorder has the right to record an acknowledged deed. It seems to me that such a record, while it is no evidence of a grant, is necessarily no evidence against it, except as against a person giving it in evidence, and claiming it as proof of his title. The defendants did not claim title under such a paper as recorded at Washington, and I am persuaded that the copy of the record there was no evidence against them any more than the copy of any other paper, which ought not to have been admitted to record. My conclusion is that the copy from the records in St. Louis, proper and regular in
113 all respects, cannot be impeached by an unauthorized record at Washington.

Proceeding now to the defence of the statute of limitations it will be necessary to state some facts bearing upon it in connection with adverse possession relied upon by defendants. As already stated, the chancery proceedings made Waddingham a tenant in common with the plaintiffs or their ancestors. It is admitted that the chancery proceedings and the proceedings in partition both included the land in controversy. Being a tenant in common, that relation is presumed to continue until it has been terminated by a purchase of his co-tenant's interest, or by an ouster of them, ripening into a superior title under the statute of limitations. Having seen that the partition proceedings, by reason of a want of service on the minors, could not work a legal transfer of their interest to Waddingham or any one else, it remains for us to consider whether they have been divested of their title under the statute of limitations, by an ouster and adverse holding by Waddingham and those claiming under him. And it is in this connection occurs the most important point in the case, which relates to the meaning and contents of the commissioners' deed to Waddingham, under the partition proceedings. The court below held that the premises in controversy were not included in such deed. If this is so, the deed could not operate by way of color of title any more than by way of legal transfer. A deed to constitute color of title must include the land in respect to which it is invoked. In this ruling of the circuit court I am unable to concur. In order to understand this point it will be necessary for me to rehearse some facts appearing in evidence. The proceedings in partition included the land in controversy, as well as other land on the west of it. It all consisted of a parcel of land fronting
137 feet on the Mississippi river, and extending back westwardly

from the river about 500 feet. All of this parcel was, after
114 report of the commissioners, ordered to be sold. The commissioners having the sale in charge divided it into lots in order to effect a more advantageous sale, and made plat thereof, which is on record. The lots next towards the river were numbers 1, 2, 3, & 4, but their eastern terminus was not extended quite to the river. A strip of about 9 to 15 feet was left between the lots and the river as it then run. Since that time this strip of 9 to 15 feet has been extended eastward by accretions from the river till it is about 200 feet deep. This action is brought to recover the strip, which appears on the plat of 1837, and the accretions given to it by the river. If the strip on the bank of the river was sold by the commissioners to Waddingham in 1837, if it was included in the deed given to him, then he or his grantees must have the same right to the accretions, by virtue of the deed as color of title, as they have to the strip on the bank. The riparian proprietor is entitled to the accretions made by the river. As it is formed it becomes the property of the riparian owner. Smith *vs.* Public Schools, 30 Mo., 290; Lebean *vs.* Gavin, 37 Mo., 555; Public Schools *vs.* Risley, 40 Mo., 356; Benson *vs.* Morrow, 61 Mo., 345; Banks *vs.* Ogden, 2 Wall., 57–69; Saulett *vs.* Sheperd, 4 Wall., 502–508. In becoming a part of the adjoining land it is necessarily included in the title to that, and is subject to the infirmities attaching to such title. If the riparian owners holds a valid conveyance for his land he will thereafter hold the accretions by the same conveyance. If he is barred, or partially barred, by the statute of limitations to the bank, he will be barred as to the accretions in like manner, although they may have been deposited but a year or a day. In becoming a part of the land to which they are joined they take the title and condition of that land just as it exists at the time of the formation of them. I mention this particularly, because I infer from the brief of counsel for plaintiffs that he regarded the statute of
115 limitations as not applying to an accretion before it was formed. But this cannot be as long as the accretion is claimed by virtue of the title of the adjoining land. The accretion, as it were, growing gradually into the soil and the title of the riparian proprietor. Now, after having laid off the lots as stated, the commissioners proceeded to sell. The order of sale included the whole premises described in the suit. In their deed to Waddingham they sold losts 1, 2, 3, and 4 for over $23,000. While they designated them as lots by their numbers on the plat, they gave the river as their eastern boundary. The deed recites: "Said lots being all bounded east by the river Mississippi, and west by an alley 20 feet wide." This includes the riparian strip by metes and bounds. It is claimed that the eastern boundary of the land conveyed, as fixed by the commissioners, was a mistake, because the lots did not run that far on the map. I am at a loss to find any facts or circumstances showing that the commissioners were mistaken, or that they did not intend to convey the land up to the river. In their report of sale they recite the fact that they laid the premises out in lots, giving their numbers "and including the alley twenty feet wide, to-

gether with a small space between the front lots and the river," which they declare "compose the premises in the petition mentioned and ordered to be sold." They also say: "The commissioners supposed that the property would sell to better advantage by being laid out as in said plat, with the alley and the space between the front lots and the river makes a part of the said front lots as sold to Waddingham." They report what was left unsold, consisting of space laid off in alleys, and thereby exclude, again, the inference that they intended to leave the river front, the most important and valuable part of the tract unsold. The location of the disputed strip and its relation to the
116 front lots all tend to sustain the intention of the commissioners, as expressed in their deed and report, to convey it as appurtenant to the front lots, or a part thereof. The declaration of such intent must prevail, if it does not do violence to the language used in the deed. And as the language of the deed fixes the eastern boundary of the lots on the river, and this boundary corresponds with the expressed intent of the report as made to the court, I am satisfied no mistake was made, and that the designated boundary must prevail. Whether the plaintiffs or their ancestors are barred by the statute of limitations depends upon the character of Waddingham's possession of those claiming under him. As a tenant in common, his possession is deemed the possession of his co-tenants, unless it is made manifestly adverse to them by open and notorious acts disclosing such a result. It is sufficient if his acts are of such a nature as by their own import to impart information and give notice to the co-tenants that an adverse possession and an actual exclusive ownership are intended to be asserted against them. Warfield *vs.* Lindell, 38 Mo., 561; Lapeyn *vs.* Paul, 47 Mo., 586; Warfield *vs.* Lindell, 30 Mo., 272; Long *vs.* Stopp, 49 Mo., 506. The court very properly declared that possession alone, however long continued, did not constitute an ouster by a tenant of his co-tenant. Such is not this case. When the proprietorship of Waddingham, and those claiming under him, is considered, it is impossible to resist the conviction that it was intended to be adverse to the plaintiffs and their ancestors, and was actually known by them to be of that character and intent. After receiving the commissioner's deed in August, 1837, he placed it on record. This was an open and notorious act by which he asserted an exclusive ownership of the land from that date. It was not a mere declara-
117 tion among his neighbors to that effect, which might or might not have come to the knowledge of the other co-tenants. It was a declaration of record that the land thereafter was entirely his, because of his deed and payment of the consideration. It was a claim of exclusive ownership, and this claim purported to originate in a divestiture of the title of his co-tenants. Those tenants had knowledge of the fact so asserted by him. They received the consideration and must be held to know at least where and how it came, although by reason of the want of service on them they are not bound by the record, according to its avowed purpose. Their guardians were the proper custodians of their lands, and when

they received the purchase-money for them as sold, they must be regarded as having actual notice of Waddingham's claim of right. In addition to this his possession of the slaughter-house on the front lots, and his exclusive use of it, in carrying on the business for himself, and the consequent use of the strip of land in front of said lots and the accretions as they were formed, all covered by a deed purporting to give him the title of his co-tenants, cannot fail to give to his proprietorship a character necessarily adverse to his co-tenants. There is no evidence of any possession or occupation in any one else till the joint possession of the city in 1875, so that his possession and claim of right covered all the land included in his deed. In 1868 he continued his acts of proprietorship by conveying the land as his own to Schulenberg. Considering his co-tenants as parties *sui juris*, their rights are unquestionably barred by an adverse possession of more than forty acres. When a party claims the exemption of the statute of limitations, it is incumbent on him to make them out by satisfactory proof. The burden is on him. I propose now to
118 examine the exemptions from the statutes as contained in the evidence of disabilities of the plaintiffs and their ancestors. Henry M. Wheeler was born on the 22 Sept., 1824; he reached his majority Sept. 22, 1845; of course he was not barred at that date. In 1847 the ten-year limitation act was passed, which operated prospectively from March 2, 1847. On the 2 March, 1857, he was barred, ten years having run against him after he was of age. He died in 1860, unmarried; but as he was disseized of his estate before death, it is unnecessary to enquire about his heirs. Lavina Campbell, plaintiff, was born Dec. 6, 1832, before any adverse possession commenced. She reached her majority Dec. 6, 1853. Ten years of adverse possession had not then taken place. The limitation of ten years under the statute of 1847 had expired March 2, 1857; and although her disability of minority had been removed for nearly four years before this time, if we give to her the statutory period of three years in which to sue, she would be barred March 2, 1860, beyond all question. It is true she was married Aug. 4, 1853, a few months before she reached her majority, but this second disability cannot be added to the disability of her minority. (20 Mo., 530.) Ann Eliza Wheeler was born May 26, 1828. She reached her majority May 26, 1849. She was married to John Hartnett Dec. 19, 1849. The limitation under the statute of 1847, with the three years additional for bringing suit, would have expired March 21, 1860, if she had so long lived, but she died March 30, 1854, leaving her husband and two children, Annie L. and Amelia E., who are parties plaintiff. Granting without admitting that the children were entitled to three full years after the death of their mother and, after the expiration of the limitation of ten years under the act of 1847, that is to say, till March 2, 1860, they would also stand barred, because their disability could not be added to the disability of
119 their mother. But it appears that after her death, March 30, 1854, her husband survived her, and died March 15, 1860. According to the ruling in Dyer *vs.* Brannock, 66 Mo., 392, the running of the statute would be suspended between 1854 and 1860,

the right of action during that time being in the husband as tenant, by curtsey. If these four years are added, the plaintiffs would still remain barred in 1864. Under the rule approved in Valle *vs.* Obenhause, 62 Mo., 81, the plaintiffs would be barred by the absolute limitation of 24 years, which runs through all these disabilities, excepting only the suspension of the right to sue by reason of an existing tenancy by curtsey. After adding the time of this suspension to the 24 years, the children of Mrs. Hartnett would be barred ten years prior to bringing the first suit in 1875. Of course the disability of their minority could not be added to the limitation of the statute. I may add here that the administrator's deed which assumed to pass the second and outstanding title of the Paynes from Miles, deceased, to Benjamin Payne was properly excluded as an instrument to convey title. The law of 1845 required such deed to be acknowledged in open court. Rev. Stat., 1845, Sec. 40, p. 89. It was not so acknowledged. But while it was ineffectual to transmit title, it was competent evidence in support of the adverse holding of Waddingham, he having assumed to acquire and hold said title after ouster of his co-tenants—certainly long after he assumed to have all the title they had ever possessed. I do not deem it necessary to review the instructions in detail. From the views I have expressed, the court will, in another trial, be able to give instructions and declarations of law applicable to the issues of the case. The judgment *pro forma* of the court of appeals is reversed; also the judgment of the circuit court, and the cause
120 is remanded for trial in conformity with this opinion. All concur. ALEXANDER MARTIN.

Adopted as the opinion of the court, and judgment will be entered accordingly.

HOUGH, *C. J.*

And on the same day a separate opinion was filed in said cause, which is in the words & figures as follows, to wit:

121 *Separate Concurring Opinion.*

Supreme Court of Missouri. October Term, 1883.

CAMPBELL *et al. vs.* THE LACLEDE GAS LIGHT CO.

From St. Louis court of appeals.

Although the case of Valle *vs.* Obenrause, 62 Mo., 81, seems to have been reluctantly cited in the foregoing report of the commissioners, and is evidently not relied upon as conclusive authority on the question of the statute of limitations, I deem it proper to say that while I concur in holding the plaintiffs to be barred, it is not upon the authority of that case; and I desire to add to what I have heretofore said in my dissenting opinion (62 Mo., 90) that a statute which deprives a married woman of her property for failing to sue for it in 24 years, when during all that time she had no right to the possession, and could not, therefore, maintain an action for such

possession, is in my judgment plainly unconstitutional. The construction given to the statute by a majority of the court in that case (62 Mo.) cannot therefore be the correct one. Kanaga *vs.* R.
121½ R., 76 Mo., 207, and case there cited.

WARWICK HOUGH.

Judges Henry, Norton, and Ray concur in the views here expressed.

122 And afterwards, to wit, on the 20th day of February, A. D. 1884, the following further proceedings were had in said cause, to wit:

LEVINA CAMPBELL *et al.*, Resp.,
vs.
LACLEDE GAS LIGHT Co., App.

Now at this day come the respondents in the above causes, by attorneys, and file their motions for a rehearing therein.

Which said motion is in the words and figures following, to wit:

123 In the Supreme Court of Missouri. October Term, 1883.

CAMPLELL *et al.*, Respondents.
vs.
THE LACLEDE GAS LIGHT CO., Appellant. } No. 1091.

Now come the respondents in the above cause, and move the court to set aside the judgment herein of February 11, 1884, reversing and remanding the cause and grant a rehearing, for the following reasons, to wit:

Under the act creating the supreme court commissioners, approved March 22, 1883, and printed in the laws of 1883, page 60, the court is authorized to submit to the commissioners such causes pending in the court as the parties or their attorneys may agree to submit for hearing, and, also, any causes that may be submitted to the court on briefs or without argument.

That the above case is not embraced in either class of cases above mentioned. It was argued orally before the court by Charles Gibson, Esq., for the appellant, and was submitted by the respondents on a printed brief. The parties or their attorneys did not at any time agree to submit the same to the commissioners.

Notwithstanding the above facts the case was decided by the commissioners, and the opinion was prepared by Mr. Commissioner Martin, and the judgment of the court was based on the action had as aforesaid by the commissioners.

LEVERETT BELL,
For Respondents.

124 And afterwards, to wit, on the 17th day of March, A. D. 1884, the following further proceedings were had in said cause, to wit:

LEVINA CAMPBELL *et al.*, Resp.,
vs.
LACLEDE GAS LIGHT COMPANY *et al.*, App.

Now at this day the court, having fully considered and understood the motions heretofore filed in the foregoing causes for a rehearing therein, doth order that said motions be, and the same are hereby, overruled.

And afterwards, to wit, on the 24th day of March, A. D. 1884, the following further proceedings were had in said cause, to wit:

LEVINA CAMPBELL *et al.*, Respondents,
vs.
THE LACLEDE GAS LIGHT COMPANY, Appellant.

Appeal from St. Louis Court of Appeals.

Now at this day come the said respondents, by attorneys, and file their motion for a final judgment herein.

Which said motion is in the words and figures following, to wit:

Supreme Court of Missouri.

CAMPBELL *et al.*, Respondent-,
vs.
THE LACLEDE GAS LIGHT CO., Appellant.

The respondents move the court to set aside the judgment herein of February 11, 1884, remanding the cause for a new trial, and enter a final judgment here disposing of the case under the opinion of the court.

LEVERETT BELL,
For Respondents.

125 And afterwards, to wit, on the 17th day of June, A. D. 1884, the following further proceedings were had in said cause, to wit:

LEVINA CAMPBELL *et al.*, Resp.,
vs.
THE LACLEDE GAS LIGHT CO., App.

App. from C't of App'ls.

Now at this day the court, having fully considered and understood the motion heretofore filed to modify the judgment herein, doth order that said motion be, and the same is hereby, overruled.

And afterwards, to wit, on the 21st day of June, A. D. 1884, the following further proceedings were had in said cause, to wit:

LEVINA CAMPBELL, FRANK H. MURRAY, and ANNIE L. MURRAY, his Wife, and Charles J. January and Annie E. January, his Wife, Respondents,

vs.

THE LACLEDE GAS LIGHT COMPANY, Appellant, and THE CITY OF ST. LOUIS.

Appeal from St. Louis court of appeals.

Now at this day come again the parties aforesaid, by their respective attorneys, and consenting that this court may
126 proceed to render such judgment as to them may seem proper upon the record herein, it is therefore considered and adjudged by the court that the plaintiffs' cause of action was at the commencement of this suit absolutely barred by the Missouri statute of limitations, and that the plaintiffs are not entitled to the rights claimed by them under the act of Congress, approved June 6th, 1874, entitled "An act for obviating the necessity of issuing patents for certain private land claims, and for other purposes;" and the judgment of the St. Louis court of appeals and the judgment of the St. Louis circuit court herein are reversed and held for naught; and it is ordered, adjudged, and decreed that the plaintiffs take nothing by this action, and that said defendant shall recover of the plaintiffs its costs in this behalf expended, and have execution therefor.

And afterwards, to wit, on the 1st day of July, A. D. 1884, an appeal bond was filed in said cause, which is in the words and figures as follows, to wit:

127 Know all men by these presents, that the City of St. Louis, as principal, and Leverett Bell and E. L. Adreon, as sureties, are held and firmly bound unto the Laclede Gas Light Company in the full and just sum of five hundred dollars, to be paid to the Laclede Gas Light Company, its heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 23d day of June, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas lately, at the April term, 1884, of the supreme court of Missouri, in a suit depending in said court between Levina Campbell, Annie L. Murray, Frank X. Murray, and Amelia E. Hartnett, plaintiffs, and The Laclede Gas Light Company, defendant, judgment was rendered against said plaintiffs, and the said plaintiffs having obtained a writ of error *of* the said Supreme Court of the United States to reverse the judgment in the aforesaid suit, and a
128 citation directed to the said defendant, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Levina Campbell and the said other plaintiffs shall prosecute said writ of error to effect, and answer all damages & costs if they

fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

WM. L. EWING, *Mayor.* [SEAL.]
LEVERETT BELL. [SEAL.]
E. L. ADREON. [SEAL.]

Approved by—

WARWICK HOUGH,
Chief Justice of the Supreme Court of Missouri.

STATE OF MISSOURI, *ss:*

I, Henry W. Ewing, clerk of the supreme court of the State of Missouri, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record and proceedings in the
129 above-entitled cause as fully as the same remain of record and on file in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said court, at office in the city of Jefferson, this 12th day of September, A. D. 1884.

[SEAL.] HENRY W. EWING, *Clerk.*

Endorsed on cover: Missouri supreme court. No. 959. Levina Campbell, Annie L. Murray, Frank X. Murray, & Amelia E. Hartnett, plaintiffs in error, *vs.* The Laclede Gas Light Company. Filed 26th September, 1884.

119-445

Office Supreme Court U. S.
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JAMES H. McKENNEY.
CLERK.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 316.

LEVINA CAMPBELL, ET AL.,

Plaintiffs in Error,

vs.

THE LACLEDE GASLIGHT COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

SUBMITTED UNDER RULE 20.

STATEMENT AND ARGUMENT FOR PLAINTIFFS IN ERROR, BY LEVERETT BELL.

ST. LOUIS:
J. W. STEELE & CO., PRINTERS.
1886.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 316.

LEVINA CAMPBELL, ET AL.,
Plaintiffs in Error,

vs.

THE LACLEDE GASLIGHT COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT AND ARGUMENT FOR PLAINTIFFS IN ERROR.

STATEMENT.

This is an action of ejectment to recover a piece of ground in the city of St. Louis, fronting about 137 feet on the Mississippi river and bounded on the south by Mullanphy street, and having a depth of about 200 feet.

The action was instituted in the state circuit court of St. Louis county on January 5, 1877. The city of St. Louis was originally a co-defendant with the Laclede gaslight company in the action. The plaintiffs below, plaintiffs in error here, on January 19, 1880, recovered a judgment for sixteen twenty-fourths of the premises sued for. Record, p. 5. An appeal was duly prosecuted by the defendants below to the supreme court of Missouri. Pending the appeal, the city of St. Louis acquired by purchase the interest of the plaintiffs in error in the premises, and on October 22, 1883, in the supreme court of Missouri, it dismissed its appeal. Record, p. 36. Thenceforward the city of St. Louis and the Laclede gaslight company have stood in opposition to each other, and the action has been prosecuted by the city of St. Louis in the name of the original plaintiffs, who are plaintiffs in error here, against said gaslight company. The Missouri statute, section 3671, 2 Rev. Stat. of Mo. of 1879, p. 625, provides as follows: "When an interest is transferred in any action now pending or hereafter to be brought other than that occasioned by death, marriage or other disability of a party, the action shall be continued in the name of the original party," etc. The judgment of the state circuit court below was reversed by the supreme court of Missouri, on June 21, 1884, and final judgment entered for the defendant, the Laclede gaslight company, in which it was adjudged that the plaintiffs' cause of action was at the commencement of the action absolutely barred by the Missouri statute of limitations, and that the plaintiffs were not entitled to the rights claimed by them under the act of congress, approved June 6, 1874, entitled "an act for obviating the necessity of issuing patents for certain private land claims, and for other purposes." Record, p. 52. The opinion of the supreme court of Missouri is printed at

pages 37 and following of the record, and the case is reported in the 84 Mo., 352.

The premises sued for are embraced in a concession made by the Spanish government to Peter Chouteau, dated October 16, 1799. The claim was duly confirmed to Chouteau by the board of commissioners for ascertaining and adjusting the titles and claims to lands in the territory of Louisiana, on May 29, 1811. Chouteau received from said board a certificate, number 671 of said date, certifying that he was entitled to a patent under the fourth section of the act of congress of March 3, 1807, entitled "an act respecting claims to lands in the territories of Orleans and Louisiana." The confirmation was duly surveyed by the deputy U. S. surveyor, and the survey was returned and filed in the office of the recorder of land titles for the U. S. on April 2, 1817, and is numbered 671. After giving in evidence the above facts, the plaintiffs read in evidence the act of congress of June 6, 1874, entitled "an act for obviating the necessity of issuing patents for certain private land claims, and for other purposes." Section one of said act provides as follows: "That all of the right, title and interest of the United States in and to all of the lands in the state of Missouri, which have at any time heretofore been confirmed to any person or persons by any act of congress, or by any officer or officers, or board or boards of commissioners, acting under and by authority of any act of congress, shall be and the same are hereby granted, released and relinquished by the United States in fee simple to the respective owners of the equitable titles thereto, and to their respective heirs and assigns forever, as fully and as completely in every respect whatever, as could be done by patents issued therefor according to law."

Also an act of the general assembly of Missouri, ap-

proved March 24, 1875, providing for the publication of the above-mentioned act of congress in the session laws of Missouri, and requiring all courts of the state to take judicial notice of the same. Record, p. 7; Laws of Mo. of 1875, p. 85.

It was then agreed that the confirmation and survey mentioned above embraced the premises in controversy. Record, pp. 7, 8.

It was further agreed that the title of Peter Chouteau to the land in controversy, excepting the accretion made thereto, became vested by regular conveyances prior to October 1, 1821, absolutely in the following named persons, to-wit: Edward C. Payne, Daniel Mc. Payne, Thomas J. Payne, John B. Payne, and James B. Payne.

The plaintiffs then offered evidence tending to show title in themselves to sixteen twenty-fourths of the ground under the above-mentioned parties. Record, pp. 12, 13.

It was admitted that the concession and confirmation to Peter Chouteau and the order of survey and survey 671, all called for the Mississippi river as the eastern boundary of the land therein described and purported to be conveyed. Record, p. 13.

The defendants offered in evidence a certified copy of what purported to be a patent from the United States to Peter Chouteau for survey 671, which copy appeared to be perfect in all respects and sufficient to pass the title to the said survey from the United States to Peter Chouteau, but which copy was made and certified by the recorder of deeds of St. Louis county, from a record thereof made in 1847 in said records. The plaintiffs objected to said certified copy as evidence, and one ground of objection was, that no such patent had ever been issued. To sustain the objection, the plaintiffs produced an exemplification of the record of patents in the

general land office of the United States, a document the same in all respects as the purported copy of the patent offered in evidence by the defendants, except that there was no seal attached to the one produced by plaintiffs; and also a letter from the commissioner of the general land office of the United States, stating that there was no evidence on the records of his office that a seal had ever been attached to the record from which said exemplification had been made.

(A copy of said letter is as follows.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., March 15, 1875.

E. P. JOHNSON, ESQ., St. Louis, Mo.:

SIR—I am in receipt of your letter of 27th ultimo, returning certified copy of patent dated March 26, 1824, in favor of Peter Chouteau, as recorded vol. 4, pp. 283 and 284, "Record of Donation Patents," which was transmitted to you with my letter of 23d ultimo, and stating that said copy is defective in that the seal has been omitted from said copy.

In reply I have to state that it appears by an examination of the *record* of said patent, that the same is defective in that the seal was omitted to be copied therein and that said copy is a true and literal exemplification of said record. It is probable that the seal of the general land office was affixed to the patent, but as there is no authority to correct the record in the absence of said patent, or to issue a duplicate patent as suggested in your letter, I return herewith said certified copy, and acknowledge the receipt of $1.60, the amount of fees which you were requested to remit in payment of same in my letter of 23d ultimo.

Respectfully,
S. S. BURDETT, Commissioner.

The original patent was not in the possession or under the control of either party to the action. Which objection the court overruled, and thereupon plaintiffs then and there excepted, and the copy of said patent was then read in evidence. Record, pp. 14, 15.

Defendants offered evidence to prove that defendants and those under whom they claim had held the actual, exclusive, public, notorious, continuous and adverse possession of the premises in controversy, claiming title thereto against all of the world for twenty-four years next preceding the institution of the first suit by plaintiffs herein, in which they suffered a non-suit; to which evidence plaintiffs objected on the ground: That the title to the said United States survey number 671 remained in the United States until the passage of the act of congress on the 6th of June, 1874, read in evidence herein, and adverse possession was therefore immaterial and no defense to the action. Which said objection of plaintiffs to said evidence in regard to possession the court overruled, to which said action of the court in overruling the same the plaintiffs then and there excepted. Record, pp. 24, 25.

Certain deeds and records and oral testimony were given in evidence by the defendant, the Laclede gaslight company, for the purpose of showing title in it to a fractional interest in the property under Edward C. Payne and others, who acquired the property by conveyance from Chouteau prior to October 1, 1821, as hereinbefore stated. It is unnecessary to set forth this evidence as it has no bearing on the question before this court. There was no testimony showing any paper title in the city of St. Louis. The circuit court declared the law to be that under the evidence the defendants could not claim title to the land in controversy by possession alone. Record, p. 26. This was on the theory that the Laclede

gaslight company and the plaintiffs were tenants in common and there was no evidence to show an ouster of one tenant in common of another tenant in common prior to the year 1868. Record. p. 26.

The judgment in the state circuit court was therefore for the plaintiffs for the undivided interest before stated. The supreme court of Missouri, in dealing with the case, held that the adverse possession of the tenant in common under whom the Laclede gaslight company claimed title, as against the other tenants in common, commenced in August, 1837. Record, p. 47; 84 Mo., at p. 375. It also held that the legal title was out of the government on March 26, 1824, the date of the patent, a certified copy of which from the records of St. Louis county was admitted in evidence against plaintiff's objection, as above stated. Record, p. 43; 84 Mo., at p. 368. Accordingly it reversed the judgment and entered a final judgment for the defendant, the Laclede gaslight company, adjudging that the plaintiffs' cause of action was absolutely barred and that the plaintiffs were not entitled to the rights claimed by them under the act of congress of June 6, 1874, entitled "an act for obviating the necessity of issuing patents for certain private land claims, and for other purposes."

QUESTION.

Under the evidence in this cause does it appear that the title of the government to the premises in controversy passed from the United States to Peter Chouteau in 1824?

ASSIGNMENT OF ERRORS.

The plaintiffs in error allege that the supreme court of Missouri erred: 1, in holding that plaintiff's cause of

The original patent was not in the possession or under the control of either party to the action. Which objection the court overruled, and thereupon plaintiffs then and there excepted, and the copy of said patent was then read in evidence. Record, pp. 14, 15.

Defendants offered evidence to prove that defendants and those under whom they claim had held the actual, exclusive, public, notorious, continuous and adverse possession of the premises in controversy, claiming title thereto against all of the world for twenty-four years next preceding the institution of the first suit by plaintiffs herein, in which they suffered a non-suit; to which evidence plaintiffs objected on the ground: That the title to the said United States survey number 671 remained in the United States until the passage of the act of congress on the 6th of June, 1874, read in evidence herein, and adverse possession was therefore immaterial and no defense to the action. Which said objection of plaintiffs to said evidence in regard to possession the court overruled, to which said action of the court in overruling the same the plaintiffs then and there excepted. Record, pp. 24, 25.

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QUESTION.

Under the evidence in this cause does it appear that the title of the government to the premises in controversy passed from the United States to Peter Chouteau in 1824?

ASSIGNMENT OF ERRORS.

The plaintiffs in error allege that the supreme court of Missouri erred: 1, in holding that plaintiff's cause of

action was barred; 2, in holding that under the evidence in the cause the title of the government to the premises in controversy passed from the United States to Peter Chouteau in 1824; and 3, in holding that the certified copy of the patent to Chouteau, from the records of St. Louis county of 1847, was better evidence of the contents of said patent than the exemplification thereof from the records of the general land office at Washington.

ARGUMENT.

The state supreme court decreed in this cause that the plaintiffs' action was absolutely barred. To reach this conclusion the court was compelled to and did hold that the title to the premises passed from the United States to Peter Chouteau under a valid patent of date March 26, 1824. If for any reason the patent referred to can be impeached and its invalidity established, it will follow that it was inoperative to transfer the title, and that the property remained in the United States until June 6, 1874, when the act of congress of that date accomplished its transfer and obviated the necessity of a patent

The present action was commenced in 1877. If the statute of limitations did not run prior to June 6, 1874, there was no bar. If, on the other hand, the statute took effect March 26, 1824, the date of the alleged patent, the judgment below, it may be conceded, cannot be disturbed. The case of Gibson vs. Chouteau, 80 U. S., 92, established the doctrine that the occupation of premises prior to the title emanating from the federal government, was ineffectual to establish title by possession.

The plaintiffs in error claim that it is not established by the evidence that a legal patent for the ground in controversy was ever issued by the United States; hence, it was not until the act of congress of June 6,

1874, that the title emanated from the government, and prior to that time, the statute did not run.

It appears from the letter of the commissioner of the general land office of date March 15, 1875, that the record in his office of the patent dated March 26, 1824, from the United States to Peter Chouteau, conveying the land in controversy, does not show that the seal required by law was attached to the original patent. This fact also appears by the exemplification of the records of the land office produced at the trial. The certified copy of the patent from the recorder of deeds of St. Louis county offered by the defendants shows a seal.

The commissioner of the general land office is required to affix his seal of office to all patents. Section 459, Rev. Stat., U. S. All patents are required to be signed, countersigned, and recorded in books kept for the purpose. Section 458. Certified copies from said books are of equal dignity with the original as evidence. Section 891.

The court has no means of knowing whether or not the original patent has the seal spoken of attached. The copy from the record in Washington shows no seal. The record kept at the general land office in Washington has no seal. This fact is established by the before-mentioned letter of the commissioner and the exemplification of the patent. Before title can vest under a patent, every requisite prescribed by law, with reference to the patent, must be complied with. The patent must be signed and countersigned, and have the seal of the general land office affixed, and be recorded in said office. In this case, if the original patent had the seal affixed, then it was not truly recorded at Washington, and the law was not observed. On the other hand, if a true record of the patent was made, then the original possessed no seal and was invalid. It makes no difference which of the

above statements embraces the fact. One or the other must be true. And, it results, that the title of the government never passed under the patent

In U. S. vs. Schurz, 102 U. S., 378, it was held that when a patent had been duly signed, sealed, countersigned and recorded the title passed. Delivery is not necessary. At page 403 the opinion of the court proceeds as follows: "The acts of congress provide for the record of all patents for land in an office, and in books kept for that purpose. An officer called the recorder is appointed to make and keep these records. He is required to recorp every patent before it is issued, and to countersign the instrument to be delivered to the grantee. This, then, is the final record of the transaction—the legally prescribed act which completes what Blackstone calls 'title by record,' and when this is done the grantee is invested with that title."

In McGarrahan vs. Mining Co., 96 U. S. 316, it was held that the statutory provisions prescribing the manner in which a patent of the United States for land shall be executed are mandatory, and each of the integral acts to be performed is essential to the perfection and validity of the instrument, and in case of a patent not countersigned it was held that the title of the United States did not pass. At page 323 the court says: "A perfect record of a perfect patent proves the grant; but a perfect record of an imperfect patent, or an imperfect record of a perfect patent has no such effect."

The Missouri statute provides as follows: "Sec. 3826. All patents for lands lying within the state of Missouri, granted to any person or persons by the president of the United States * * * * may be recorded in the office of the recorder of the county in which the lands are situated." * * * *

"Sec. 3827. All copies of patents so recorded, or which

may have been heretofore recorded, duly certified by the recorder, under his official seal, shall be received in all courts in this state as *prima facie* evidence of the contents of such patents." 1 Rev. Stat. of Mo. of 1879, p. 651.

By the Missouri statute the copy of a patent certified by the recorder of the county in which the patent was recorded is *prima facie* evidence only of the contents of the patent. Whereas by section 891 of the Rev. Stat. of the U. S. a certified copy of the patent from the records of the general land office at Washington is of equal dignity with the original as evidence.

The question of title by limitation in this case turns on the point whether the patent to Chouteau of date March 26, 1824, was a valid patent. In other words, to make out title by limitation it was incumbent that the defendants should establish that the title to the premises passed from the United States to Peter Chouteau on March 26, 1824. The plaintiffs in error contended that the title to the premises remained in the government until the act of congress of June 6, 1874. To establish this point it was necessary for them to impeach the Chouteau patent. The original patent is not, so far as is known, in existence. It was not in the possession of any of the parties at the trial. Secondary evidence was resorted to to establish the contents of the patent. The defendants produced a certified copy of a record of the patent in Missouri, which, under the terms of the Missouri statute, is *prima facie* evidence only of the contents of the original patent. The plaintiffs produced an exemplification of the record of the patent in the general land office, and under the terms of section 891 of the United States revised statutes, this exemplification is of equal dignity with the original patent as evidence. The certified copy from Missouri exhibits a patent in proper

form with a seal. The certified copy from Washington exhibits the same patent in all respects, except that the seal is omitted. Which shall prevail, the copy of the Missouri record, or the copy of the Washington record? The question answers itself. Congress has made the copy from the record at Washington of equal dignity with the original as evidence. The Washington copy must therefore overthrow the Missouri copy. If the original patent had been produced at the trial with the seal omitted, it would have prevailed over the Missouri copy. The case comes within the language of McGarrahan vs. Mining Co., 96 U. S., 316, above quoted. The defendants endeavored to show a patent from the United States to Chouteau in 1824. The *prima facie* evidence introduced by the defendants on the question of patent or no patent, was met and overthrown by the evidence from the records of the general land office. There was no valid patent. Accordingly the title to the ground remained in the government until 1874, up to which time no length of occupation and possession served to create a title in the defendants. The reasoning of the supreme court of Missouri on this point is to be found at page 368 of 84 Mo. Rep., and it is unsatisfactory. The judgment, it is submitted, should be reversed and the cause remanded, with instructions to grant a new trial.

LEVERETT BELL,

for Plaintiffs in Error.

119-445

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1886.

LEVINA CAMPBELL,
Plaintiff & Plaintiff in Error,

vs.

THE LACLEDE GAS-LIGHT COMPANY,
Defendant in Error.

SUBMITTED ON BRIEF UNDER RULE 20.

ARGUMENT FOR DEFENDANT IN ERROR.

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AND C. E. GIBSON,
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ARGUMENT FOR DEFENDANT IN ERROR.

The only point before this court for decision is one concerning limitation, and hinges upon the question whether the title of the United States to the land in controversy passed by a patent issued on March 26, 1824.

The defendant offered in evidence a certified copy of a

Patent from the United States to Peter Chouteau covering the land in controversy, this copy being made and certified by the recorder of deeds of St. Louis County from a record thereof made in 1847 in said Recorder's Office.

A seal in due form appears in this copy and it is perfect in every respect.

The learned counsel for plaintiff correctly quotes the provisions of the Missouri statute relating to the recording of patents for land (p. 10 of his brief), and which is as follows: —

Section 3826. "All patents for land lying within the State of Missouri, granted to any person or persons by the President of the United States or the governor of this State, may be recorded in the office of the Recorder of the county in which the lands are situated."

Section 3827. "All copies of patents so recorded, or which may have heretofore been recorded duly certified by the recorder under his official seal, shall be received in all courts in this State as *prima facie* evidence of the contents of such patents."

The above provisions have been on the statute book for a great number of years past and plaintiff in his brief concedes that a copy issued in conformity thereto is *prima facie* evidence of the original.

It is admitted by plaintiff that defendant and his grantors have been in the adverse possession of the premises since 1837, and therefore if the copy from the records of the recorder of St. Louis County was admissible in evidence, it is clear the plaintiff would be barred by limitation, as this copy shows that the title passed from the government March 26, 1824 (the date of the patent), and in that event the land became subject to the Statute of Limitations from that time. After conceding the *prima facie* effect of the St. Louis copy, plaintiff assails it on the ground that the copy

from the Records of the General Land Office at Washington shows no seal; that this Washington record is, under the laws of Congress, of equal dignity with the original patent; that if the original patent were produced showing no seal it would overthrow the St. Louis copy, and theresore the Washington record overcomes the *prima facie* effect of the St. Louis copy. The determination of this question necessitates the consideration of that provision of the congressional law to which plaintiff refers — "certified copies from said books are of equal dignity with the original as evidence."

We submit that the only fair meaning to be given to the above provision is that copies from said records are to be received in evidence equally with the originals. That is to raise said records from secondary to primary evidence and enable parties to introduce them in evidence without producing or accounting for the originals.

This was the sole purpose of Congress in the enactment of said provision. It was never designed that the mistake of a clerk in copying a patent into the Washington record should cut off all competent proof of the original.

In McGarrahan *v.* Mining Co., 96 U. S. 323, Chief Justice Waite, in speaking on this point, says: "The failure to record the patent does not defeat the grant. It only takes from the party *one of the means of making his proof*," and then after adding that an imperfect record of a perfect patent does not prove the grant it is said: "In such a case if a perfect patent has in fact issued, *it must be proved in some other way than by the record.*"

In Booth *v.* Tiernan, 109 U. S. 205, an original deed had been lost, and a certified copy from the record was offered in evidence. The description of the land in this copy was erroneous and plaintiff offered parol testimony to show the error in the copy.

This was objected to on the ground that the statute of the State authorizing the record of a deed or a certified transcript from the record to be used as evidence on a trial

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enacted that it might be read in evidence "*with like effect as though the original of such a deed, conveyance or other writing was produced and read in evidence.*"

It was contended that if the original had been produced no evidence would be admitted to prove and correct the alleged mistake in the description of the premises conveyed, and therefore none could be admitted to prove and correct such mistake in the record copy.

Say the court: "The language of the statute was intended merely to declare that the record of a deed or a transcript from the record, though a copy only and therefore in its nature merely secondary evidence, should nevertheless have the same effect, when competent as evidence at all, as the original itself, if it had been produced on the determination of the issues to be tried. It was not intended that the record or a copy from it should be an original instrument for all purposes. The presumption is that as public officers generally perform their prescribed duties accurately, the record and all certified transcripts from it will be true copies of the original; but they are none the less copies on that account and are made evidence only in lieu of the original and on the grounds on which secondary evidence is permitted to be given.

And there is nothing in the statute either expressed or implied, which forbids the party from showing by extrinsic proof, otherwise legitimate what the contents of the lost original really were, when it is shown that the record itself or a copy from it is not a true copy."

The Court then refers with approval to a like construction given to similar statutes by the Supreme Courts of Illinois, Alabama, Wisconsin and New Hampshire.

If a copy which may be read in evidence "with like effect as though the original was produced and read in evidence," may be shown incorrect by any legitimate evidence, is not this equally true of a copy which is of "equal dignity with the original?"

The first named copy is certainly of as great dignity as

the latter, and the one has no greater sanctity than the other.

Hence the point that the St. Louis copy could not be admitted in evidence as against the Washington copy is not well taken.

The plaintiff further contends that the recording of the patent at Washington was essential to its validity, and that the record is imperfect in that it shows no seal.

We submit that it has never been held to be the duty of a purchaser of land to investigate the records at Washington to see that the patent had been duly recorded or that a failure to correctly record a patent defeats the grant. We contend that when a patent has been duly signed by the President, countersigned by the Recorder, sealed and delivered, the title at once vests in the patentee, and that an incorrect record in the General Land Office cannot affect the grant, which has attached on delivery. And this is the view taken by this Court in McGarrahan *v.* Mining Co., 96 U. S. 316.

In enumerating the requisites necessary to a valid patent on page 320 it is said: "Thus it appears that a patent for lands must be signed in the name of the President, either by himself or his duly appointed secretary, sealed with the seal of the General Land Office and countersigned by the recorder.

"Until all these things have been done the United States has not executed a patent for a grant of lands." It is to be observed that the recording in the General Land Office is not referred to as essential to the grant.

But all doubt as to the meaning of the Court is removed by the following language (p. 323): "*The failure to record the patent does not defeat the grant. It only takes from the party one of the means of making his proof.*

"*If he can produce the patent itself and that is executed with all the formalities required by law, he can still maintain his rights under it. He is not therefore necessarily deprived of his rights because of a defective record.*"

In Moore *v.* Robbins, 96 U. S., p. 533 it is said: "The functions of that department (the executive department) necessarily cease when the title has passed from the govment.

"And the title does so pass in every instance where under the decision of the officers having authority in the matter, a conveyance generally called a patent, has been signed by the president and sealed, and delivered to and accepted by grantee."

The *recording* is not here mentioned as an essential.

If no patent is valid unless it has been correctly recorded, it necessitates an examination of the records of the General Land Office by every landowner in the United States, before he can be sure his patent is of any value whatever, and the result is that any grant made by the government *may be defeated by a clerical mistake of the recording clerk.*

We submit this has never been the law and is against public policy that it should be.

If the court rules against us and holds that the recording the patent at Washington is an absolute prerequisite to its validity, we still maintain the record there is a snfficient compliance with the law to show a valid grant.

The only objection is the clerical omission of the seal on the record in the General Land Office at Washington; but this, as in the case, of all patents concludes as follows: "In testimony whereof I, James Monroe, President of the United States, have caused these letters to be made patent, *and the seal of the General Land Office to be hereunto affixed.*"

In McGarrahan *v.* Mining Co., on page 322, it is said: "The names (referring to the signatures of the president and recorder), need not be fully inserted in the record, but it must appear in some form that the names were actually signed to the patent when it issued. *If they are partially inserted in the record it will be presumed they fully appeared in the patent.*"

In the case at bar the record states the seal has been af-

fixed; can it not, therefore, be equally presumed that the seal fully appeared on the patent?

If the names are partially inserted in the record they are presumed to appear in full in the patent; here the fact that a seal has been affixed appears from a statement of the recorded copy; can it not with equal reason be presumed that the seal appeared on the original?

It is the settled doctrine of this court that if possession has been held under a deed for thirty years or more, and it comes from the proper custody, it may be admitted in evidence without further proof — that is, its signature is presumed to be genuine.

Applegate *v.* Mining Co., 117 U. S. 255.

Here possession has been held under this patent since 1826; its validity has never been questioned by the government; the record of the General Land Office states that a seal has been affixed; the letter introduced in evidence by the plaintiff from the Commissioner of the General Land Office to E. P. Johnson, Esq. (Rec. p. 15), shows that the executive department considers the seal to have been affixed to the original patent; the record at St. Louis made by public officials sworn to a faithful discharge of duty, and acting under fundamental statutes of the State which have always prevailed in Missouri and in all or nearly all the other States, purports to be a true copy of the original and *shows a seal.* Under these circumstances can not a seal to the original patent be *presumed?*

In Geary *v.* City of Kansas, 61 Mo. 378, a certified copy of a deed was objected to on the ground that it contained no seal but there was a statement that the seal had been duly affixed. In holding the copy admissible the Supreme Court of Missouri said: "But it is not necessary for the recorder to attempt to copy the seal; nor is it necessary for him to note the place where the seal was placed in the original; the statement in the body of the certificate that

the clerk who made it affixed the seal authorizes the presumption that such seal was affixed and the general current of authority favors this view. (Heddon *v.* Overton, 4 Bibb, 406; Griffin *v.* Schoffield, 38 Miss. 359; Sneed *v.* Ward, 5 Dana, 187; Smith *v.* Hill, 13 Cal. 510.) In Jones *v.* Martin (16 Cal. 165), where the recorder not merely omitted any seals but placed the word 'no seal' to a certificate purporting to be under the hand and official seal of the notary it was still held sufficient." In Strother *v.* Lucas, 12 Pet. 411, this Court said: "In favor of long possession everything which has been done shall be presumed to have been rightfully done; *and although it do not appear to have been done, the law will presume that whatever was necessary has been done.*"

We therefore contend, that from the record at Washington a seal to the original may be presumed. This presumption being based on the long possession of defendant and its grantors; on the fact that the Washington record states the seal had been affixed; on the St. Louis copy which shows a seal, and also because the patent has always been treated by the Government as valid.

We do not contend that time runs against the government, or that a conveyance from the government can be presumed by mere lapse of time, but we say that when there is a conflict of evidence as to the contents of a patent, which would be conclusively settled by the original, if it were or could be produced, then the ordinary rule as to presumption of evidence after thirty years should be applied.

The question here is, whether this patent had the seal affixed or not. On one side the Washington record does not contain the scroll indicating the seal; on the other side is fifty years' possession, and the recognition of the grant as valid by the Land Department during all that time; a perfect equitable title; no grant or other disposition of the land to any other person; the statement in the body of the record at Washington that the seal was affixed, and the St.

Louis record showing the seal was affixed. We affirm that the judicial conclusion from these undisputed facts is that the seal was affixed.

The best that can be said by plaintiff of the Washington record is that it conflicts with itself, the body of it stating that the seal was affixed, and the scroll being omitted.

It it be true that the seal was not affixed, then the clerk had no power or authority to record the patent. His action was a nullity, and a violation of duty. The record would be blank paper and consequently it would not rebut the St. Louis record after such a long lapse of time, and constant recognition by the Executive Department; the officer is presumed to have intended to do his duty, and to have recorded a valid and not a void patent.

The decisions quoted above prove that the settled doctrine of this Court is that a party may prove the contents of the patent *aliunde* when the record is defective. Now, after the lapse of thirty years when all witnesses are dead, and the original is presumed to be, and in this case is, lost, we contend, with perfect confidence that the proof is ample and conclusive that this patent did contain the seal. Rarely, indeed, does such satisfactory evidence exist after the lapse of sixty-two years — the time between 1824 and 1886.

A summary of the foregoing argument may be briefly stated thus: First. The Congressional Statute referred to by plaintiff makes the Washington copy admissible as original evidence, but it does not exclude any competent proof of the original and, therefore, the St. Louis copy was admissible and shows the original had a seal.

Secondly. If the Washington record is defective in not showing a seal, this is immaterial, as recording is not essential to the validity of the grant.

Thirdly. Even if recording is absolutely essential to the validity of the grant, the Washington record is still sufficient, for its only defect (the lack of a seal) will be cured for the reasons above given by a presumption of law.

For the convenience of the court we annex hereto a copy of the opinion of the Supreme Court of Missouri on the points involved in this writ of error, the same being reported in 84 Mo. 368.

"It is contended by plaintiff that the legal title had not passed from the Government until the passage of the act for obviating the necessity of issuing patents which was approved in 1874, while the defendants contend that the legal title was out as early as 1824.

In proof of their position they submitted a copy of the patent to Pierre Chouteau of that date, certified by the Recorder of St. Louis County. It is regular in all respects, and shows an authentication under seal. The statutes of this State make such copies *prima facie* evidence of the patents so certified. To impeach the validity of this paper the plaintiff submitted in evidence an exemplified copy from the records of the land office at Washington, of a patent corresponding in all respects with the one proved by defendants except that it was wanting in a seal. A letter from the Commissioner of the land office appears in evidence in which he writes that the record was truly copied and that a seal was probably affixed to the patent, but had been omitted in copying it into the record. He also confessed himself unable to correct the record unless the original was produced. On what principle this letter was admitted in evidence, I am unable to discover from the bill of exceptions. It is argued by counsel for plaintiffs that recording in the land office at Washington was a necessary condition to a grant by patent, and that the patentee if he held at all, was a holder of title by record. It is also urged that as the laws of the United States, besides requiring the patent to be recorded, declared that the record should be of equal dignity with the patent, the exemplified copy from the record at Washington must equally with the original impeach any copy made elsewhere. R. S. U. S. 458, 459, 891.

I am not very much impressed with the force of this position.

The law requires a patent to be signed and sealed. It also requires the recorder of the land office to countersign it and attend to the engrossing and transmission of it to the grantee.

That section which declares that copies from the record to be of equal dignity with the patents themselves was intended only to obviate the necessity of producing the originals or accounting for them before making use of the copies from the record.

In the very nature of things a copy can not be as reliable as the original.

Suppose the original was produced in court and the copy from the record also, and a variance of a word between the two papers was apparent. Is it not clear that the original would be the superior evidence and that it would impeach the copy in respect to the variance?

In McGarrahan *v.* Mining Co., 96 U. S. 323, Chief Justice Wait says: "The failure to record the patent does not defeat the grant. It only takes from the party *one of the means of making his proof.*

"If he can produce the patent itself and that it is executed with all the formalities required by the law, he can still maintain his rights under it. He is therefore not necessarily deprived of his title because of a defective record.

"He is in no worse condition with the signatures omitted than he would have been if this description of his land had been erroneously copied or *other mistakes had been made which rendered the record useless for the purposes of evidence.* A perfect record of a perfect patent proves the grant; but a perfect record of an imperfect patent or an imperfect record of a perfect patent, has no such effect. In such a case, if a perfect patent has in fact issued, *it must be proved in some other way than by the record.*" Clearly when the record fails to prove a perfect patent, the grantee or those claiming under it, are at liberty to prove